JAMES LARRY TAULBEE

GENOCIDE, MASS ATROCITY, AND WAR CRIMES IN MODERN HISTORY

BLOOD AND CONSCIENCE

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Genocide, Mass Atrocity, and War Crimes in Modern History

Genocide, Mass Atrocity, and War Crimes in Modern History

Blood and Conscience

Volume 1: Genocide and Mass Atrocity

JAMES LARRY TAULBEE

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Preface

Despite denunciations and much public outrage and handwringing over particular incidents, genocide and mass atrocity remain a reality in contemporary international politics. Events in Africa, Asia, and the Middle East seemingly produce horror stories on a daily basis. To an extent, we have become somewhat numb and inoculated from the shock because the 24-hour news cycle constantly bombards us with new horror stories involving violence against innocents. After a point, new stories simply heighten fear without necessarily increasing interest in exploring or learning more. The information creates avoidance in the sense of "tuning out," not engagement.

As this book went to press, five events, one from personal experience and four that involved international press releases, reinforced the reasons that I undertook this project. They underscored the importance of trying to generate more awareness of the incidence and roots of mass atrocity and genocide in modern history as well as its practice in contemporary times. A very touching personal experience came from a visit to the Turks and Caicos National Museum on Grand Turk Island.[1] The museum, located in a moderate-sized house, had a small upstairs side room exhibit that focused on the origins and fate of the Lucayan people who inhabited the Bahamas prior to the discovery of the island by Europeans in 1492. Within a few years, because the land itself seemed useless and the islands had no precious metals, the Spanish began taking large numbers of Lucayans as slaves. Estimates place the Lucayan population at approximately 40,000 at the time the first Europeans arrived. By 1520, the Lucayans had ceased to exist as a separate race and society. What we know about their tribe and culture comes solely from reconstruction of, and deduction from, archeological evidence. Chapter 9 discusses memory as a casualty of genocide. A deep sadness comes from the realization that the Lucayans were perhaps the first "new world" victims of a genocidal policy. Yet so few people know the story because they left no written records, and no oral tradition has survived.

The first international event formed an antepenultimate episode in the long-running saga associated with the territories of the former Yugoslavia. The ad hoc United Nations Court for the former Yugoslavia (ICTY) found former Bosnian Serb leader Radovan Karadžić guilty of genocide for being one of the chief planners of, and participants in, what many consider to be the worst war crime since World War II—the 1995 Srebrenica massacre. In another case, the court found Vojislav Šešlj not guilty. The decision has caused a firestorm of protest but serves as a caveat about the nature of the judicial process. The ICTY still has two other cases in process. For health reasons, the trial of Goran Hadžić has been in temporary suspension since October 2014. The trial of Ratzko Mladić, the last case on the ICTY docket, has been completed, but a judgment is not anticipated until November 2017. Each of these cases will also automatically be submitted to the Appeals Chamber for review.

The completion of the appeals sometime before 2020 will end the mission of the court 25 years after the events. These events signal a potential end to *one* effort to deal with the crimes in *one* conflict that produced many incidents that shocked the world. The ad hoc International Criminal Tribunal for Rwanda (ICTR) has also concluded its business, but the problems, cost, and time associated with the international prosecution of so few generate further questions about the utility of such prosecutions. The results have satisfied neither victims nor those who feel the effort was totally one-sided. Particularly in Kosovo, the Serbian community has deep resentment over the lack of attention to what they perceive as a deliberate international blindness concerning allegations of war crimes committed by Albanian militias in the same period.

In another landmark case, the permanent International Criminal Court (ICC) found Congolese militia leader Jean-Pierre Bemba guilty of crimes against humanity (murder, rape, and pillage) and war crimes committed by his troops in the Central African republic in 2002–2003. The fourth event occurred when a Pretrial Chamber of the ICC acted to send the case of Lord's Resistance Army (LRA) commander Dominic Ongwen, nicknamed the "White Ant" (Uganda), to trial. Ongwen's case has an unusual twist in that he did not willingly join the LRA but was a kidnap victim when he was only seven years old. His case raises an issue discussed in Volume II of this set, *War and War Crime Trials*—that of child soldiers. Charges against Ongwen comprise crimes against humanity (murder, enslavement, and other inhumane acts) and several counts alleging war crimes (murder, cruel treatment, attack against the civilian population, and pillaging). The court also issued several other indictments. These include Joseph Kony, the leader of the LRA.

Given the process and time, the ICTY and ICTR trials have had little impact in terms of promoting reconciliation. Because of perceptions of bias with regard to the choice of individuals prosecuted, the exercise might actually have had the reverse effect. As noted earlier, chapter 9 discusses the issue of “memory” as an important consideration when dealing with the aftereffects of mass atrocities. As a caveat, please note that this book does not address the issues connected with healing the individual and societal wounds inflicted by genocides and other mass atrocities. That remains as a future project.

The narrative does not attempt a comprehensive discussion of all incidents of genocide and mass atrocity, nor does it seek to assign a hierarchical ranking to cases. That task would require several volumes. Rather, the book focuses on selective cases in a comparative framework to explore the factors that lead to genocide. Genocide and mass atrocity do not fit into a one-size-fits-all set of explanatory factors; therefore, the cases chosen illustrate particular typologies. The first three chapters discuss the history, debates, and essential concepts necessary to follow the rationale of each case study. The following case studies each illustrate the combination of factors that led to the policies pursued.

I owe debts incurred in the writing to a number of people. Ann Kelleher gave insightful critiques of the chapter on Namibia and discussion of the Northern Ireland case. The Emory University library staff deserves a commendation for service above and beyond for their invaluable assistance in locating obscure fugitive materials. My wife, Diane, was always there with an appropriate remedy when my motivation seemed at low ebb. Finally, Steve Catalano, my editor, gave unwavering support during some very difficult personal circumstances during the writing. I can truthfully say that without his encouragement and confidence at crucial points, this book would never have been finished. Of course, I remain wholly responsible for any errors of fact and my conclusions.

JLT
April 2016

CHAPTER 1

Genocide and Mass Atrocity: Defining Contexts and Crimes

> Certain situations demand bluntness and anger, and the continued perpetration of genocide, in our minds, is one of them.
>
> —Samuel Totten and William S. Parsons[1]

SOME PRELIMINARY NOTES

We have little evidence to identify with any certainty where or when the first mass killing that would qualify as genocide occurred. Nonetheless, the introduction to a recent book on genocide in history begins with an interesting observation by a 16th-century Portuguese Jesuit: "At the beginning of the world all was homicide."[2] Although the historical evidence from antiquity is sparse and ambiguous, the author notes that this quote contains "more than a grain of truth."[3] In this observation he has considerable support.[4]

The word "genocide," historically speaking, has a very recent origin, dating only from 1944,[5] but the circumstances it evokes have numerous historical counterparts. One should reflect on the following passage from *The Iliad*:

> Thus did he plead, and Menelaus was for yielding and giving him to a squire to take to the ships of the Achaeans, but Agamemnon came running up to him and rebuked him. "My good Menelaus," said he, "this is no time for giving quarter. Has, then, your house fared so well at the hands of the Trojans? Let us not spare a single one of them—not even the child unborn and in its mother's womb; let not a man of them be left alive, but let all in Ilius perish, unheeded and forgotten."[6]

The Bible, other chronicles of the ancient Middle East, Greek and Roman chronicles, as well as more recent history yield numerous instances of human slaughter on a massive scale. The sack of Troy, the tactics of the Assyrians, the total extermination of several tribes by the Israelites, the destruction of Carthage by Rome, Julius Caesar's expeditions in Gaul, the Roman campaign in Judaea led by Titus, many incidents in the Crusades, the French campaigns against heretics—the Albigensians (Cathars), Waldensians, and Huguenots—the massacre at Magdeburg during the Thirty Years' War, as well as in Asia where the conquests by Amir Timur (Timur Lenk, Tamerlane) and Genghis Khan, all provide classic examples where large populations were completely or almost completely destroyed. Unfortunately, these were not isolated actors and events in the history of civilization. While perhaps not as extensive as the graphic Hobbesian description of the state of nature as a "war of all against all" suggests, violence and the threat of violence, either from outsiders or as a risk associated with everyday life, has plagued many societies throughout the ages.[7]

Leo Kuper, one of the pioneers in research on genocide, notes that what he terms "genocidal massacres" often marked the practices of many peoples that we consider "civilized."[8] Many have argued that policies toward indigenous peoples stand as a prime example, particularly during the time of colonial expansion into Asia, Africa, the Pacific, and the Americas. Robert Hitchcock and Tara Twedt have asserted that "over the past 500 years, literally millions of indigenous peoples have had to cope with destruction of the life ways and habitats, disease, dispossession, and exploitation."[9] Christopher Columbus, as governor of the lands he found, instituted slavery and systematic extermination against the native Tainos.[10] One recent study estimates that from the time that Columbus first came to the Americas in 1492 to the Wounded Knee massacre in 1890, the indigenous populations of the Western Hemisphere (North, Central, and South America) declined from an estimated 100 million to 1.8 million due to the attitudes and policies of the "more civilized" settlers.[11] We could quibble over numbers because population estimates for past times are guesstimates. Still, whether 100 million or 50 million forms the original estimate, the precipitous decline calls attention to events that very few history books address except as footnotes.

These comments aside, what is worrisome is that the reasons for atrocities in the past seem to draw upon motivations that still find considerable resonance in the contemporary era. Roger Smith observes that "Camus called the twentieth century an age of murder, but it is more precisely an age of politically sanctioned mass murder, of collective, premeditated death intended to serve the ends of the state."[12] Unfortunately, neither Camus's characterization nor Smith's embellishment can be dismissed as merely an ideological rant. R. J. Rummel has calculated that deliberate mass killings in the 20th century have resulted in the deaths of more than four times as many people as have died in all the wars and revolutions combined during the same 100-year span.[13] Ironically, the greatest proportion of these deaths has resulted from the actions of governments—the primary function of which, presumably, is to protect individuals from violence—against their own subjects.

More ironically, these episodes of genocide have occurred as the international community has moved toward a broad acceptance of fundamental human rights as a basic norm of contemporary international politics. Sparked in large part by reactions to the Holocaust, the post–World War II era (since 1945) has witnessed the development of an impressive array of declarations, conventions, and other international agreements—aimed at promoting and securing the idea that all individuals should have a set of basic rights, regardless of the political regime they live under. Beginning with one of the most famous resolutions of the United Nations General Assembly in 1948, the Universal Declaration of Human Rights,[14] a set of international conventions, known collectively as "The International Bill of Rights," has evolved. The reference to the first 10 amendments to the U.S. Constitution acknowledges the central role the United States played in the movement.

Nonetheless, while the *idea* of individual human rights may have great emotional appeal, translating the idea into actions that have real meaning and impact has proven very difficult. The response of the international community has embodied the classic explanation "a day late and a dollar short," with devastating consequences. For example, the Genocide Convention (1948) entered into force in 1951.[15] The United States did not ratify the treaty until 1988, and then only with restrictive legislation severely limiting its domestic application. The first trials for genocide under an international authority did not occur until 1998, after events in the territory of the former Yugoslavia and Rwanda prodded states to set up tribunals under the auspices of the United Nations.

Here, we need to add another observation based on the double-faced nature of scientific knowledge and, in particular, the revolution in communications technology. During a time when advances in modern science have provided the means to extend the life span of many on the planet, greater scientific knowledge has also enhanced the means available to orchestrate and efficiently carry out policies that cut short the life spans of those in targeted groups. Alvarez notes that "what modernity has done is reshape genocide into a more efficient and rational endeavor capable of killing on an industrial scale."[16]

At the beginning of the 20th century, the idea that knowledge and science would make war more humane dominated efforts to control the effects of war. Hiram Maxim, the inventor of the machine gun, thought that it would bring an end to war because of the obvious carnage it could inflict. Sadly, World War I disproved the proposition that because people knew more about the consequences, they would be more restrained. The tactics in World War I generated massive casualties. The Battle of the

Somme (1916) alone resulted in over *1 million* deaths.[17] With the advent of aerial bombing and even more deadly weapons in World War II, 50 million people lost their lives. Confirmed civilian deaths made up at least half that number, but many historians contend that the number of people who perished in bombings, by famine, or by other circumstances related to the conditions created by the conflict may have been much higher.[18]

The revolution in communications has resulted in a second, equally disturbing and related problem: we know more, more quickly. This has two aspects: internal and external. Technology permits governments to track more easily the movements of those within their borders. For totalitarian governments, it facilitates the suppression of any opposition. On the international side, we now watch revolutions and internal wars in close to real time, as they unfold. Yet, knowing more, more quickly, does not necessarily result in action to deal with the events in a timely fashion. President Bill Clinton gave a moving speech at the opening of the Holocaust Memorial Museum in Washington, D.C. (April 22, 1993), in which he said: "The evil represented in this museum is incontestable. But as we are its witness, so must we remain its adversary in the world in which we live. So we must stop the fabricators of history and the bullies as well. Left unchallenged, they would still prey upon the powerless; and we must not permit that to happen again."[19] At the time, Serbia was pursuing its campaign of ethnic cleansing in Bosnia, but neither the United States nor its allies took timely action; nor did they a year later during the mass killing in Rwanda.

Indeed, the United Nations had a peacekeeping force in Rwanda. Its commander, General Roméo Dallaire, had knowledge of the plans and information on the location of weapons stockpiled for use in the massacre. His superiors ordered him to take no action.[20] The Italian and French governments sent troops to evacuate their own nationals but refused to expand those missions to include actions that might have prevented, or at the very least minimized, the subsequent slaughter. Samuel Totten and William Parsons have noted the enormous chasm between expressions of rhetorical concern and real action: "Numerous times throughout this century [i.e., the 20th century], no government, either individually or collectively, has taken it upon itself to address this issue or to be proactive in this regard."[21] For many practical reasons, shared outrage does not necessarily translate into common goals and agendas accompanied by well-timed, appropriate remedial action. The barriers between expressed concern and positive action will be discussed in greater detail later in this chapter.

The Crime without a Name—The Crime of Crimes

Curiously, there are very few studies that examine genocide and mass atrocity as a phenomenon apart from the extensive accounts of particular instances. Historians and other social scientists have not really systematically addressed many of the issues. For the ancient and medieval world, this is understandable because of a lack of surviving source material. Eyewitness accounts from observers are sparse; those from victims nonexistent. It is less so for the modern era, although investigators do face some formidable obstacles. Certain high-profile cases—the Armenians in Turkey, Jews in Nazi Germany, and the Tutsi in Rwanda—have drawn a great deal of attention. For others, the Hereros in Namibia (German South-West Africa) for instance, the victim population may not have had a constituency with sufficient interest and resources to push for investigation and documentation of events. Indeed, studies routinely cite the Armenian case as the first in the 20th century, even though the war against the Hereros predates it by a decade.

Difficulty in accessing relevant sources has inhibited investigators. Political, practical, logistical, and administrative barriers can limit the possibilities for collecting relevant information. Even years after an occurrence, governments often deny or distort the historical record. They reject requests for access to archives that contain relevant documents, or the documents might not exist because they have been destroyed. Eyewitness accounts can yield valuable evidence, but these depend on the willingness of observers to give information or other documentation and access to survivors.

Participants in, or passive observers of, the genocide have obvious reasons for not cooperating, especially in the contemporary era. If they do give information and stay in their homeland, they could face harassment, prosecution, or perhaps simply "disappear." If participants emigrate, they could face prosecution or ostracism. On the survivor side, testimony will be colored by the simple fact that documenting the events was not something on their mind as they struggled to survive. Moreover, survivors may be extremely wary of strangers who wish to question them. They may still live under the same regime that fostered or condoned the persecution.[22] Language can be a critical obstacle. Finally, oral accounts are an essential humanizing component in that they give individual voices to the otherwise abstract, faceless numbers. Yet, oral accounts by victims and others have value only to the extent of their accuracy and the validity of the methodology used in collection.

Identifying Genocide in History: Problems of Definition

To this point, the introductory discussion has presumed that all instances of mass murder or atrocity meet the criteria for "genocide." Yet, if certain behaviors should be considered as the most heinous of criminal transgressions in the sense of being unforgivable acts condemned by all humanity, we need to have specific parameters that categorically set these apart as special cases. Does "genocide" depend on numbers killed? If so, is there a minimum? Does mass murder without concern for the identity of the victims constitute genocide? Does a systematic campaign to eliminate political opponents or other perceived threats to a government qualify as genocide? In terms of a contemporary discussion, do the events in Darfur (Sudan) since 2003 constitute genocide? Simply, we need to develop a set of criteria that will guide us through the various case studies in a systematic and comparative way in order to gain some understanding of the forces that drive occurrences of large-scale killing of innocents. A good definition will provide the essential foundation.

Having made that point, no single, authoritative list of historical events that constitute "genocide" exists because scholars and other interested parties have not reached agreement on what factors should be included in a definition of the term. Many of the examples listed in the opening paragraphs of this chapter would not fit some definitions, although certainly they are instances of mass murder and related atrocity. The debate continues because many factors contribute to the problem of definition. First, the casual use of the word to impart emotional emphasis and attention to situations has created conceptual confusion. People believe that characterizing a situation as "genocide," because of its identification with the Holocaust, carries an affective component that generates a greater level of awareness and outrage than use of the seemingly vague and less precise term "crimes against humanity" or other terms. The report of the United Nations Commission of Inquiry on Darfur (2004) triggered an uproar of major proportions when it concluded that crimes against humanity, not genocide, formed the appropriate characterization of the ongoing attacks against civilians in Sudan. The report explicitly noted that the crimes were "no less serious and heinous than genocide."[23] Nonetheless, advocates feared that a finding of crimes against humanity would not generate the outrage necessary to goad the international community into taking appropriate action.

Still, indiscriminate use to provide emphasis risks trivializing the term to the point that it no longer serves as a useful concept. For example, the term has been used to describe the U.S. atomic attacks on Hiroshima and Nagasaki in World War II ("white-collar technological genocide");[24] and the advocacy of family planning, birth control, and abortions among Third World peoples; the open city aerial attacks by both sides in World War II; and even suburbanization.[25] Jack Porter argues that "when one needs a catch-all phrase to describe 'oppression' of one form or another, one often resorts to labeling it 'genocide.' The net result is a debasement of the concept."[26]

From an opposing perspective, Israel Charny makes an impassioned argument for inclusion: "The definition of genocide adopted in law and by professional social scientists must match the realities of life, so that there should be no situation in which thousands and even millions of defenseless victims of mass murder do not 'qualify' as victims of genocide."[27] Along these same lines, Gérard Prunier notes that the exact definition makes little difference to those who continue to die.[28] We can appreciate the fact that quibbles over minor details should not inhibit responses, but an inherent tension exists between the need for inclusion and the necessity for differentiation, between breadth of coverage and rigor. On the one hand, if we characterize all instances where a relatively large number of people have been killed as genocide, the concept has little real meaning. On the other hand, adopting very rigorous criteria could exclude people, groups, or events that merit protection.

A second tension exists between simplicity and complexity. Simplicity or complexity does not necessarily make a difference in utility. Simple definitions can be exceedingly broad or very restrictive. The utility of more complex definitions depends on the specificity and completeness of the added elements. Legal definitions are complex and specific because they have to spell out in some detail the exact acts and circumstances that define the crime so that those concerned with application have a common set of criteria. For example, consider the death of a person as the result of a bar fight. The elements in the definition in the statute pertinent to the incident will determine how the district attorney characterizes the particular *circumstances* in terms of assessing the legal liability of the individual or individuals involved. Was the death justifiable self-defense, an accident, or murder?[29] If murder, was it premeditated, the result of foreseeable reckless behavior, or unintentional but still negligent?

This conclusion points to the third issue. Can one specify in advance all possible permutations? Definitions are based on ideal types. What are the possible consequences of loopholes or *lacunae* (gaps)? In drafting extradition treaties with other countries, the United States uses lists of offenses (enumerative method) to define crimes that qualify. This means that as new crimes emerge, "skyjacking" for example, the United States has had to negotiate additions (protocols) to every relevant treaty if it wishes to have that crime included. Another issue stems from the fact that definitions of offenses, criminal fraud for example, can entail vastly different standards in other countries. As many British jurists have argued about the attempts to define "aggression," complexity might merely provide an unwitting trap for the innocent and unwary while providing a road map and set of signposts for the malevolent.

Fourth, definitions in the sense that they differentiate and categorize—that is, separate one set of circumstances from another—often vary because they are keyed to serve different ends or purposes. Purpose will determine the factors selected for inclusion (and by extension, those for exclusion). The definition used by a research project aimed at developing a comparative historical perspective might have quite different elements from that developed for a criminal statute, even though both require criteria that reliably apply to a broad range of circumstances (cases). *In the case of genocide, a major part of the problem of definition stems from the fact that the definition in the Genocide Convention is designed as part of a legal regime. As such, it is limited to the purpose of providing judgments of guilt or innocence, not as a concept devised to examine a broad range of historical events.*

Fifth, definitions of genocide attempt to characterize very highly charged political situations. Given the emotional climate surrounding incidents where large numbers of people have been harmed or killed, can there ever be a neutral definition accepted by all? Alvarez notes that "definitions of genocide often revolve around particular political agendas of inclusion and condemnation, even of exclusion and outright denial."[30] Any definition that seeks to characterize events or participants that have political implications will generate controversy. Turks to this day steadfastly deny that the treatment of the Armenians during World War I qualifies as genocide. In 2006, Uzbekistan dedicated a museum in Tashkent to Amir Timur (Tamerlane), whose name among Western historians evokes visions of ruthless destruction.[31]

Finally, related to all of these points, the word has entered into everyday discourse, so we have dictionary definitions that differ from those used by scholars or lawyers. For example, the *Merriam-Webster Collegiate Dictionary* defines genocide as "the deliberate and systematic destruction of a racial, political, or cultural group."[32] The dictionary definition includes two categories, "political" and "cultural," specifically excluded from definition in the Genocide Convention,[33] and does not include three named groups: national, religious, and ethnical.

Perhaps, considering purpose alone, no one definition is possible. Professor Philip Jessup, an influential member of the international legal community, counseled: "One should always have in the background of one's mind a multiplicity of definitions covering the subject at hand in order to prevent oneself from accepting the most obvious."[34] Accordingly, next we shall examine some common definitions and their implications to derive some working assumptions about what specific factors separate genocide from crimes against humanity and other instances of mass murder and atrocity.

The Origin of the Word: From a Crime without a Name to the "Crime of Crimes"

As noted earlier, prior to World War II, no single term characterized all aspects of the Armenian case, nor of the Holocaust. Raphael Lemkin coined the term "genocide" by combining the Greek word *genos* (race, tribe) and the Latin *cide* (killing). He described genocide as "an old practice in a new guise."[35] In 1933, Lemkin had made a proposal to a conference on international criminal law (Madrid) sponsored by the Legal Council of the League of Nations. The proposal advocated making large-scale murder and other actions aimed at destroying groups an international crime. The conference failed to adopt any part of the proposal. Nonetheless, his effort proved the starting point for developing the criteria used in the Genocide Convention (1948).[36]

Lemkin searched for a new word because he felt that existing terminology failed to capture the multifaceted character of Nazi intentions and actions. Existing terms emphasized the cultural, economic, and social aspects of many prior instances but did not reference biological means, such as sterilization and forced abortion, which he thought essential to a complete definition. For example, since the end of WWI, "denationalization" had comprised a recognized category of war crimes, but while the definition captured some aspects, it did not apply outside the limited conditions of armed conflict and occupation, and it applied only to national, not ethnic, groups.

Lemkin's own brief definition was simple: "the destruction of a nation or of an ethnic group."[37] Individuals become victims solely because of their identity as members of the national or ethnic group. This simple definition limits who would qualify as a victim (nation or ethnic group), but it encompasses a wide variety of actions in terms of the means used to carry out the necessary plans. Note that, in this respect, Lemkin's original definition would not meet Charny's objections discussed earlier.[38]

For Lemkin, destruction did not necessarily mean physical annihilation. He focused on the idea of collective identity and emphasized the many ways, apart from mass murder, that perpetrators could undermine the ability of specific groups to perpetuate the distinctive characteristics that defined them as identifiable and separate. These include forced abortion, sterilization, relocation, deliberate separation of families, as well as policies aimed at destroying personal dignity, independence, economic sustainability, and cultural institutions. He argued that genocide has two phases: first, the destruction of the old patterns of identity, and second, the imposition of the "national pattern of the oppressor."[39] He noted that

> generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at *the destruction of essential foundations of the life of national groups*, with the aim of annihilating the groups themselves.[40]

Lemkin used the new term to examine the goals of Nazi occupation policies in Europe. In particular, Lemkin argued that for Germany, World War II was fought against peoples as well as armies. Hitler had made this clear:

> It will be one of the chief tasks of German statesmanship for all time to prevent by every means in our power, the further increase of the Slav races. Natural instincts bid all living beings not merely conquer their enemies, but also destroy them. In former days, it was the victor's prerogative to destroy entire tribes, entire peoples. By doing this gradually and without bloodshed, we demonstrate our humanity. We should remember, too, that we are merely doing unto others as they would have done to us.[41]

Some—the Dutch, Swedes, and Norwegians, seen as having blood kinship—would be "Germanized." The Jews (and probably the Gypsies) would be totally annihilated. Other "non-Aryan peoples"—Serbs, Slavs, Slovenes, and Poles—would simply disappear as identifiable separate ethnicities. Lemkin contended that Nazi policies had aimed at nothing less than a total demographic restructuring of the European continent with the ultimate goal of placing Germany in a "position to deal with other European peoples from the vantage point of biological superiority."[42] Enemy nations within the control of Germany had to be weakened or destroyed in order to achieve the goal.

Crimes against Humanity and Genocide: Evolution

The trials after World War II provide a good demonstration of how definitions matter. Lemkin's 1944 book had a major impact, even though the term had not yet entered into general usage at the time the Allies prepared the charter for the Nuremberg trial of Nazi leaders. The London Charter establishing the International Military Tribunal (IMT)[43] introduced a new concept, "crimes against humanity," defined as

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before and after the war, or persecutions on political, racial or religious grounds in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal whether or not in violation of the domestic law of the country where perpetrated.[44]

The definition of crimes against humanity in the London Charter is more inclusive than that for genocide developed by Lemkin in terms of targeted populations—"any civilian population" rather than "national" or "ethnic" group. But crimes against humanity as defined had an important restriction. *Crimes of humanity were tied to those crimes that comprised the jurisdiction of the court, which meant they were defined as a type of war crime*. This necessitated an important precondition—an international armed conflict. Make note of this limitation because it became an important consideration 50 years later when the ad hoc International Criminal Tribunal for Yugoslavia (ICTY) heard its first cases. A second problem, the London Charter specifically barred the court from taking into consideration any events prior to the outbreak of the war on September 1, 1939. This precluded the IMT from considering any persecution of Jews or other minority groups within Germany itself prior to the outbreak of the war.

Further confusion would ensue because several indictments, *France v. Goering et al*. being representative, did charge defendants with "deliberate and systematic genocide, viz., the extermination of racial and national groups against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles, and Gypsies."[45] This not only seemed to equate genocide with crimes against humanity but also, by implication, tied genocide to the precondition of international armed conflict. The importance of this is simple. If international armed conflict is a defining condition—that is, if genocide/crimes against humanity can only occur within an international armed conflict—then most of the occurrences after 1945 would fall outside the definition.

Moreover, because of the restrictions, the prosecution really did not concentrate on the domestic aspects of Nazi policy when presenting evidence. Note that the indictment in *France v. Goering et al.*, cited in the last paragraph, refers to the "civilian populations of certain occupied countries," not to acts within Germany's borders. Although the final judgment discussed Nazi ideology and prewar persecution of German Jews, it did so in the context of plans for aggressive war, not as prosecutable offenses per se. Telford Taylor, who served as the prosecutor for the 12 subsequent trials (under Contro Council Law No. 10), wrote in his final report: "None of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of *its own inhabitants* in peacetime constitute crimes under international law."[46]

A second set of trials under a different charter known as Control Council Law No. 10 (CCL 10, 1945) went further in establishing both crimes against humanity and genocide as international crimes. CCL 10 empowered any of the occupying authorities to try suspected war criminals in their respective occupation zones. France held a small number of trials in its zone of occupation and several in France for atrocities committed during Germany's occupation of France. The Union of Soviet Socialist Republics (U.S.S.R.) chose not to hold trials in its zone of occupation. Instead, it tried Nazi military personnel in the U.S.S.R. for atrocities committed against civilians during Germany's occupation of Soviet territory. Great Britain conducted numerous trials in its zone of occupation before military courts. Many of these involved the deliberate killing of prisoners of war.

In a series of 12 trials known as "Subsequent Nuremberg Proceedings," the United States tried 185 additional defendants, representing many sectors of German society.[47] In particular, indictments in the "*Ministries* case" (21 individuals),[48] the *Einsatzgruppen* case (24 individuals),[49] and the *Rasse-und Siedlungshauptamt-SS* (Race and Settlement Main Office—RuSHA) trials (14 individuals)[50] included genocide as a charge, as did the final judgments. The *Einsatzgruppen* units were mobile death squads responsible for implementing the "Final Solution" in areas taken by the German army. RuSHA was the specific agency within the *Sicherheitspolizei* (SiPo) responsible for classification of hundreds of thousands of civilians in the occupied territories on racial criteria. In applying their racial patterns in Eastern Europe, they laid the foundation for the targeted ethnic reordering of Europe.

All of these cases involved closed systems (bureaucracies) that had a clearly defined purpose, assigned roles, and definitive boundaries. The hierarchy made it easy to assess degrees of liability based on job assignment. A position within the system indicated that an individual had performed overt acts in accordance with assigned duties. In all the cases, the tribunal had access to detailed records that each group kept to confirm the nature and extent of their work.

Despite some lack of precision in the definition, these cases, along with others tried in national courts, did address the wide range of means used to accomplish German purposes. These trials would become the precedent for the ad hoc tribunals set up 50 years later under United Nations auspices to try those responsible for the mass murders and atrocities in Bosnia (former Yugoslavia), Rwanda, Sierra Leone, and Cambodia. Other national courts in Germany and Eastern Europe drew upon the International Military Tribunal and used the idea of genocide/crimes against humanity as a basis for prosecution of individuals. These established a clear precedent for genocide/crimes against humanity as a crime that directly involved individual culpability. Apart from the question of definition, this also marked a major change in fundamental assumptions about how international law applies to states in that it established the idea of *individual* rather than *collective* liability for acts carried out by agents of the state in performing their duties as defined by domestic law.[51] It meant that individuals acting within the laws of their country could be held liable for crimes committed while carrying out their respective responsibilities in obeying the directives in the law.

The Genocide Convention: The Politics of Definition

The details of the Holocaust shocked the international community. The move to create an international agreement to deal with "genocide" rapidly gained ground among the members of the newly formed United Nations. In one of its first acts, in 1946, the UN General Assembly approved Resolution 95(1) entitled "Affirmation of the Principles of International Law Recognized by the Nuremberg Charter."[52] Note that this resolution does not attempt to formulate the "Nuremberg principles" in detail. That task eventually devolved upon the International Law Commission (ILC) because the Sixth Committee (Legal Questions) considered it an undertaking that required more careful and prolonged study.

The General Assembly also adopted Resolution 96(1) "The Crime of Genocide" on the same day.[53] The first paragraph of the resolution defined genocide as "the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings." The resolution also noted that "many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed entirely, or in part." During the debate leading up to adoption, support for developing a new treaty grew. Interestingly, this assignment went to the Economic and Social Council rather than to the Committee on the Development of International Law and Its Codification (later the ILC).

The important point here is that the UN General Assembly does not have any authority to legislate in the sense of making new rules of binding law. Because it passed unanimously and without debate, Resolution 96(1) does have some normative value in that it stands as a strong expression of sentiment concerning the issue. But, as noted earlier in this chapter, a considerable gap has existed between rhetorical support and effective action. We can see this in that, almost immediately, divisions appeared over what groups and what actions should be included in the proposed convention. These divisions had much to do with the evolving postwar political climate. The increasing split between the U.S.S.R. and the Western powers that became the Cold War, the issues of Palestine, India/Pakistan/Kashmir, and the rising anticolonial movement all played a part.

Still, Resolution 96(1) stands as an important symbolic act in terms of the actual drafting of the convention.[54] First, it separated genocide from the broader "crimes against humanity" and eliminated the inadvertent, but unfortunate, Nuremberg connection with the precondition of international armed conflict. Second, it clearly stated that genocide constituted a crime for which both private individuals and public officials could be prosecuted. Official position could not be used as a defense to avoid liability. Third, it established the principle that individuals could be punished under international law even if no breach of domestic law had occurred. The draft convention explicitly incorporated these three important provisions.

The definition adopted for the Convention on the Prevention and Punishment of the Crime of Genocide in Article II drew on Lemkin's original formulation:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[55]

Article I also affirmed that genocide could occur in peacetime as well as during war.

Not unexpectedly, the definition received much criticism for being a political compromise, and hence, much too narrow. Note the difference between the inclusiveness of the definition in Resolution 96(1), "entire human groups," and the strict specification of groups protected by Article II of the convention. The convention does not include cultural genocide (ethnocide) or actions taken against political groups. It does not specify criteria that give substance to many of the operative terms. Does genocide entail a certain number or a certain percentage of a certain number of a targeted group? It does not spell out who has the right to assess a violation, then apprehend, try, and punish the alleged crime—it defines a crime but has no provisions for punishment. The original proposals did envisage an international court that would have jurisdiction to try offenses under the proposed Code of Crimes against the Peace and Security of Mankind, which would presumably include genocide. After a rocky start, the effort to develop the code and the court lay in abeyance until resurrected in the late 1980s.[56] The renewed effort in the 1990s would result in the establishment of the International Criminal Court (ICC).[57]

Intuitively, the idea of genocide generates visions of large numbers and a protracted time frame. Yet, given the definition, numbers are relative to the size of the group. If a targeted group has only a few hundred or a few thousand members, a campaign against it might not affect large numbers and, with modern technology, a single episode could effectively destroy its identity. In July of 1995, the Bosnian town of Srebrenica became the scene of the worst massacre in the Bosnian war. In the five days after Serbian forces took the town, it is estimated that they killed between 7,000 and 8,000 Muslim men and forcibly displaced another 25,000 to 30,000 women and children.[58] The International Criminal Tribunal for Yugoslavia indicted those responsible for genocide.[59] The difficulty is that this action still leaves open the question of thresholds.

The definition and convention mark a response to problems generated by specific 20th-century events. As such, the obligations are designed to prevent a reoccurrence of the paradigm situations, presuming that future incidents will replicate those in the past. This should not surprise. Despite its alleged deficiencies, the rapidly fragmenting political climate, and the radical departure from long-accepted principles of international law, the impetus provided by reactions to the Holocaust resulted in a surprisingly rapid entry into force for the convention. Over the years since the treaty entered into force, attempts to amend and extend the definition have generated little enthusiasm among states.

Decisions, Debates, and Dilemmas

Not surprisingly, many scholars, Charny as a good example, have argued that the narrowness of the definition in the convention renders it useless as a research tool because it excludes too much when we consider historical experience and events after World War II. Nonetheless, a full understanding of the debate over definitions requires some additional commentary about the four categories and their relationship to each other. First, the four groups clearly overlap. They do not form four separate categories with clear boundaries. Second, this means that because of the imprecision, none has an exact definition apart from a specific context. Each has a subjective component. To phrase it in a different way, all of the terms are social constructs rather than precisely delimited scientific denotations. Third, the four terms help to define each other. Schabas notes that the four together operate "much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection."[60] Fourth, we must consider the purpose of the definition. *The framers intended to define the international "crime of crimes," the equivalent of first-degree murder with aggravated circumstances in domestic legal codes. They did not attempt to create a comprehensive international criminal code.*

Another major limitation stems from the phrase in Article II of the Convention that acts must be taken "with *intent* to destroy, in whole, or in part."[61] The convention includes harmful actions other than that of simple killing, but this phrase posits an important limiting condition in terms of the purpose of the destructive acts. What if the purpose/intent is not to destroy but to terrorize the population to bolster a repressive government or to suppress political opposition? Alvarez has pointed out a number of difficulties with respect to how the convention definition would or would not apply to a number of high-profile incidents. It would encompass Turkish treatment of the Armenians but not Stalin's (U.S.S.R.) systematic destruction of the kulaks in the 1930s; nor would it apply to the "dirty war" (1970s) in Argentina or the "disappeared" in Chile during the Pinochet regime (late 1970s, early 1980s).[62] Since World War II, targeted populations, with very few exceptions (Bosnia and Rwanda), have not fallen within the parameters of the convention. Neither would Idi Amin's Uganda or Pol Pot's Cambodia. The contemporary debate over whether the actions of the Sudanese government in Darfur equate to genocide continues.

The perceived limitations of the definition in the Genocide Convention mean the debate over inclusiveness continues. This has resulted in several different approaches. Some have simply ignored the convention definition and supplied their own; some have embellished the convention definition; some have accepted it as a benchmark and worked around it.[63] In a jab at some of the nit-picking engaged in by scholars over precise definitions of terms, Marion Levy declared that scholars fight over definitions when they lack good ideas.[64]

The question becomes, in terms of understanding instances of mass killing and atrocity, do we need a definition of genocide other than that which defines the international crime, given that the definition reflects the compromises needed to get an agreement at the time? To go back to Levy's statement, does it really matter for other than a few people engaged in obscure academic debates if the definition has little relevance to their projects and purposes? Perhaps, if such definitions help illuminate the roots of incidents of mass atrocity and form a basis to prod states to further action; but, the fact that we have a definition enshrined in an international convention that defines a major crime cannot be ignored. At worst, it provides a good starting place. This is the position adopted by Leo Kuper, a pioneer in the study of genocide:

> I shall follow the definition of genocide given in the [UN] Convention. This is not to say that I agree with the definition. . . . However, I do not think it helpful to create new definitions of genocide, when there is an internationally recognized definition and a Genocide Convention which might become the basis for some effective action, however limited the underlying conception.[65]

Scholarly definitions and theories may enhance our understanding of events, but the definitions will not provide the basis for international action unless the community has formally enshrined them in appropriate international legal instruments.[66]

Note also that while *legal* obligations do not have retroactive effect, this does not mean that we cannot use the categories included in the definition as an intellectual tool to explore earlier instances of mass murder and atrocity. With that said, rather than trying to stretch the idea of genocide in order to cast a wider net, I will include two more concepts in the analysis, "politicide"[67] and "democide,"[68] to address situations that involve other "crimes against humanity." Because human behaviors in the real world seldom fit exactly into ideal abstract types, like the groups in the definition, inevitably all of these terms have some overlap even though each focuses on different elements. The belief that unarmed civilians should not be targeted victims under any circumstances stands at the center of each.

Crimes against Humanity

Even though it comprises one of the categories of offenses in the charter for the Nuremberg trials, and currently forms one of four categories or crimes that comprise the jurisdiction of the International Criminal Court, for reasons I noted earlier, the concept of crimes against humanity seems to have less resonance than that of genocide. *Genocide actually forms a specific subcategory of crimes against humanity*.[69] Crimes against humanity, as are those associated with genocide, are ordinary crimes—murder; enslavement; forcible deportation; unjust imprisonment; torture; rape; persecution on political, racial, and religious grounds; or other inhumane acts.[70] But crimes against humanity are distinguishable from genocide in that they do not require an intent to "destroy in whole or in part," as cited in the 1948 Genocide Convention, but only target a given group and carry out a policy of "widespread or systematic" violations. What elevates ordinary crimes to the status of a concern for the international community is the commission of these crimes in a "systematic manner or on a mass scale."[71]

A deliberate mass killing of civilians during an armed conflict could also be considered as both a war crime and a crime against humanity. However, crimes against humanity may also occur in the absence of an armed conflict. In contrast, a single act may be considered a war crime. Crimes against humanity differ from genocide in that they do not require proof of an "intent to destroy in whole or in part" and include persecution on the basis of political or ideological grounds. I will discuss this further in chapter 2.

The evolution of the idea of crimes against humanity forms an interesting study in how new international norms develop. The process can be both erratic and slow. In this case, development of a relatively coherent standard took about 50 years. Table 1.1 summarizes the major steps.

Scholars have argued that the history of crimes against humanity originates with the Martens Clause, originally inserted into the preamble of the 1899 Hague (II) Convention, which makes reference to the "laws of humanity." The language usually cited comes from the preamble of the 1907 Hague (IV) Convention. When the Ottoman government began its campaign against the Armenians in 1915 (during World War I), France, Great Britain, and Russia issued a joint declaration condemning the campaign and accusing Turkish officials of "crimes against humanity and civilization." The declaration also spoke of personal accountability.[72] Although the reference to personal accountability in the 1915 joint declaration stands out as an interesting departure from normal diplomatic and legal discourse of the time, neither of these references marked more than expressions of hope and outrage. *Moral outrage and intuitive understandings do not automatically translate into effective legal obligations in the form of rules that can be applied consistently and fairly time after time.*

The London Charter (Nuremburg Trials, 1945) did mark a radical departure from past practice in that it defined a new set of crimes and introduced the principle of direct personal liability for these offenses. Some have challenged the process and results as "victor's justice" on various grounds, including the lack of relevant applicable standards prior to the conflict.[73] Questions relating to the validity of these charges go beyond this discussion. They involve a considerable debate over the evidentiary value of an extremely vague and questionable body of practice as being sufficient to establish a customary law of humanity.[74] Validity of the specific proceedings and their provenance aside, the principles have now become an accepted part of international law.

Three difficulties emerged after World War II. First, because the Nuremberg tribunals prosecuted crimes against humanity along with other

Table 1.1

Crimes against Humanity: Evolutionary Development

Instrument	Year
Hague Conventions, Martens Claus	1899, 1907
Joint Declaration against Turkish action against the Armenians (Great Britain, Russia, France)	1915
London Charter for Trials of Major War Criminals	1945
General Assembly Resolution 96(1)	1946
Formulation of the Nuremberg Principles, International Law Commission	1950
First Draft Code of Offences against the Peace and Security of Mankind	1951
Second Draft Code of Offences against the Peace and Security of Mankind	1954
Apartheid Convention	1973
First Draft Code of Crimes against the Peace and Security of Mankind	1991
Inter-American Convention on Forced Disappearance	1994
Statute of the International Criminal Tribunal for Yugoslavia	1993
Statute of the International Criminal Tribunal for Rwanda	1994
Second Draft Code of Crimes against the Peace and Security of Mankind	1996
Rome Statute of the International Criminal Court	1997

crimes, the courts often failed to clarify the content or the scope of crimes against humanity or systematically elaborate the meaning of key terms. This left future courts with a problem of precise definition. Second, as noted in the discussion of the Nuremberg trials earlier, prosecutors and others often used the terms "genocide" and "crimes against humanity" interchangeably, thus adding to the confusion. Third, because of international reaction to the Jewish Holocaust, genocide emerged as the pressing issue. Margaret deGuzman provides a concise summary of why the international community focused on genocide rather than crimes against humanity in the aftermath of World War II:

> The concept of genocide both captured the essence of the recent Nazi crimes and provided a moral prototype with which it was hard to disagree. Governments were hard pressed to resist international jurisdiction over genocide in the name of state sovereignty. In contrast, crimes against humanity were ill-defined and seemed to present a significantly greater danger of infringing on state sovereignty.[75]

Indeed, ironically, the focus on the Jewish Holocaust both helped and hindered the process of developing an international criminal law apart from traditional international law. While the still-fresh horror clearly provided the impetus for the rapid development and adoption of the Genocide Convention, the very fact that *something* had been done undermined other efforts to clarify and codify what might be included in crimes against humanity.

In the early 1950s, the International Law Commission (ILC) produced both a draft statute for an international criminal court[76] and two versions of a Draft Code of Offences against the Peace and Security of Mankind.[77] The 1954 draft code defined crimes against humanity as inhumane acts or persecutions "committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."[78] The interesting fact about the definition stems from the omission of any reference to war, either international or internal. By removing the contextual requirement of war associated with the definition in the London Charter for the Nuremberg trials, crimes against humanity could occur in peacetime, thus redirecting the focus to the involvement of the state. Following the submission of the 1954 Draft Code of Offences to the General Assembly for consideration, further discussion and action on the topic was suspended for several decades because the Cold War had made the entire exercise highly controversial.[79]

Not until the early 1990s, as Cold War tensions abated, did the ILC resume work on a definition and revision of the draft code. In the interim, as a punishable standard, crimes against humanity remained remarkably vague, although several national courts conducted prosecutions.[80] For many reasons not germane to this discussion, these cases tended to confuse rather than clarify and develop the Nuremberg principles such as they were. Between 1954 and the approval of the Rome Statute of the International Criminal Court, the Apartheid Convention (1973)[81] and the Inter-American Convention on Forced Disappearance[82] suggested two additional offenses to be included.

The defining moments in refining the category came with the Security Council creation of the ICTY (Yugoslavia) and the ICTR (Rwanda) and the entry into force of the Rome Statute of the International Criminal Court.[83] In developing the statutes for the ICTR and ICTY, the Security Council drew upon CCL 10. Even so, the two statutes differ in one important respect: Article 5 of the ICTY Statute expanded the essential *contextual* element to any armed conflict, whether international or *internal* in character, but still limited the scope to civilian populations. More confusion resulted because Article 3 of the ICTR Statute added two additional elements: widespread or systematic attacks and discriminatory grounds (national, political, ethnic, racial, or religious) but did *not* require armed conflict as a condition.

Article 7 of the Statute for the International Criminal Court (1997) combined the contextual elements of the two ad hoc tribunals and expanded the list of offenses to include forced transfer of population, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, sexual violence, forced disappearance, and apartheid. The ICC Statute made it clear that crimes against humanity could occur in peacetime as well as during an international or internal war.[84]

At the time, given the broad participation in drafting the Rome Statute, the definition in the ICC Statute should have stood as the definitive statement of codification. It did not. Other international courts set up after the adoption of the ICC Statute have not utilized the ICC definition in its entirety. The documents authorizing the Special Court for Sierra Leone (2002),[85] the Extraordinary Chambers in the Courts of Cambodia (2003),[86] and the Serious Crimes Panel in East Timor[87] developed their own definitions rather than simply copying the one in the ICC Statute. Because the ICC has not yet established a track record based on actual trials, and the judgments of the ad hoc courts have been inconsistent, many issues remain unresolved.

DEFINITIONS MATTER: SOME NOTES ON "ETHNIC CLEANSING"

In a speech to the United Nations General Assembly in September 2012, Mahmoud Abbas, president of the Palestinian Authority, accused Israel of "ethnic cleansing in the West Bank."[88] His charge renewed debate over the exact definition of the term. Experts agree that the phrase "ethnic cleansing" originated with the activities of the Serbian army and its supporters in Bosnia and Croatia during hostilities in the early 1990s.[89] Most simply, it refers to the attempt to create ethnically homogenous areas through the forcible displacement or deportation of persons belonging to ethnic groups deemed undesirable. Andrew Bell-Fialkoff argues that while the terminology may be modern, the motives are not. Others disagree, arguing that ethnic cleansing, unlike earlier forced displacements, has distinctive 20th-century roots.[90] For this discussion, the dispute has little relevance. Given the purposes of this book, I have adopted the broader view that ethnic cleansing and older references to "forced population transfer" and "forced expulsion" all describe practices aimed at removing specific human groups from a given area.[91]

During the Middle Ages in Europe, those in power used religion rather than ethnicity as the basis for persecution and removal. Cleansing later manifested itself in political ideology, as part of Communism and Fascism. Analysts have also adopted the term to describe the treatment of the people of East Timor by Indonesian radicals after citizens there voted in favor of independence in 1999, and to the treatment of Chechens who fled

Grozny and other areas of Chechnya following Russian military operations against Chechen separatists during the 1990s. The events in Darfur offer another situation that has generated much debate. Bell-Fialkoff states the problem:

> Despite its recurrence, ethnic cleansing nonetheless defies easy definition. At one end it is virtually indistinguishable from forced emigration and population exchange while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an "undesirable" population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.[92]

Several international bodies have examined the question in detail. Helsinki Watch (1991) was the first NGO to define the situation unfolding in the territory of the former Yugoslavia as genocide.[93] The UN General Assembly, UN Security Council, the ICTY, the ICTR, and the ICC have all struggled with issues associated with that conflict. Paragraph 9 of the preamble to UN General Assembly Resolution 47/121 (December 18, 1992) alludes to "the abhorrent policy of 'ethnic cleansing' (which) is a form of genocide." The following year (1993) the Security Council by Resolution 827 (May 25, 1993) established the ICTY to deal with allegations of war crimes and crimes against humanity (including ethnic cleansing) within the territory of the former Yugoslavia. The Elements of Crimes in the ICC Statute lists forcible transfer of children under genocide (Article 6 (e)) but forcible transfers of population under crimes against humanity (Article 7.1(d)).[94]

What emerges from an examination of the record is that "ethnic cleansing" as a broad descriptive term covers a wide range of actions that violate international humanitarian law. Most ethnic cleansing methods constitute grave breaches of the 1949 Geneva Conventions and the 1977 Additional Protocols.[95] Ethnic cleansing can be a war crime, a crime against humanity, and/or genocide, depending on the context. Intent will determine if events meet the critical test for genocide or are charged as crimes against humanity.

Moving Beyond Legal Definitions

This chapter has focused first on the legal concepts and definitions because these have formed the basis for international action in response to mass atrocity. Many issues remain unresolved, not the least of which involves the question of numbers. We rarely know the precise number of victims in a particular incident or episode. We also do not know in the abstract how many victims it takes to prick the "conscience of humanity" sufficiently hard to make an event or series of events rise to the level of international concern, and thence, from expressed concern to action. At the moment of this writing, an ongoing conflict in Syria has resulted in large-scale civilian casualties and displacement of people.[96] The international community has expressed concern but has taken no action beyond attempts at diplomatic intervention.

The next two concepts, politicide and democide, attempt to deal with this issue by developing categories of classification. Rather than suggesting a broader definition of genocide, the authors have attempted to build on the idea of a sliding scale, as suggested by Henry Huttenbach and Robert Melson among others, to develop a typology that will permit systematic comparison of episodes. These two concepts also merit some attention because they direct attention to the role of governments in the deliberate targeting of groups for political or ideological reasons.

Politicide

The categories in the Genocide Convention focus on factors primarily associated with an identity defined by the communal circumstance of birth (nationality, race, ethnicity) or descent. Religion does not conform exactly to the other three as a factor necessarily determined by birth or descent, although where, and to whom born, often does dictate religious association. Politicide and democide both differ from genocide in the criteria used to define victims. Barbara Harff and Ted Robert Gurr define "politicide" as the deliberate targeting of groups because of "their hierarchical position or political opposition to the regime and dominant groups."[97] Their definition parallels that in the Genocide Convention. It includes "killing members of a group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part" and specifically includes political victims.[98] This approach reverses the normal emphasis on categories of victims by emphasizing the objectives of the state and the motives of the ruling elite rather than the communal identity of the victims.

Drawing on previous work by Helen Fein, Leo Kuper, and Vahakn Dadrian, Harff and Gurr suggested six distinctive categories:[99]

1. Hegemonial genocide—the forced submission of groups during the consolidation of power in a new state or in the course of national expansion
2. Xenophobic genocide—policies driven by doctrines of national protection or social purification that define the victims as alien and threatening
3. Repressive politicide—targeting of opposition parties, factions, and movements
4. Repressive hegemonial politicide—targeting of ethnic or national groups perceived as regime opponents

5. Revolutionary mass murder—targeting of class or political enemies for ideological reasons
6. Retributive politicide—targeting of previously dominant or influential groups out of resentment for past privileges or abuses

Democide

R. J. Rummel does not advocate replacing or expanding the definition of genocide. He does argue, however, that we need a term for international society analogous to the generic crime of murder in domestic legal codes. He also suggests that we need to locate instances of mass murder/atrocity along a continuum.[100] Rummel defines democide as the "murder of any person or people by a government" or "by government agencies acting authoritatively."[101] On that one dimension, democide includes genocide, politicide, and mass murder. Like Harff and Gurr, he places genocide within a larger framework that seeks to categorize mass killings according to the factors (including unintentional) that give rise to the incidents. Because democide only deals with death, other acts, such as forcible transfer of population or systematic rape and sterilization, which constitute genocide and crimes against humanity but do not result in the death of victims, fall outside the definition. It is not all encompassing.

Rummel has been criticized for ignoring the role of democracies in creating, aiding, and abetting genocide. Alvarez argues that police and military training programs for putative allies, weapons sales, and political support (or benign blindness) for oppressive regimes (e.g., Duvalier in Haiti, Somoza in Nicaragua, Pinochet in Chile, among others) have enabled and indirectly supported genocidal policies.[102]

Characterizing Mass Atrocity: A Perspective

First, let us understand that genocide is a crime—indeed, the most egregious of all crimes. When analyzing the issues of mass atrocity/genocide, the incident should not be viewed as an undifferentiated aggregate. One has to understand that many different ordinary criminal acts—murder, rape, and battery, for example—must form pieces of a much larger picture in order for a situation to rise to the level of international concern. Even then, other factors, such as intent, will come into play to determine the appropriate category: genocide, war crimes, or crimes against humanity.

CHAPTER 2

Politics, Practice, and Principles: The Framework for International Action

> We have all been bystanders to genocide. The crucial question is why.
>
> —Samantha Power[1]

POLITICS, PRINCIPLES, AND DEFINITIONS

The quote heading this chapter captures an essential problem. The international community, certainly not a stranger to misfortune, has not responded to the sufferings of others in ways that have mattered. Genocide as the "international crime of crimes"—the one crime considered most heinous among all others—has generated more rhetoric than responsive action. In an advisory opinion, the International Court of Justice (ICJ) characterized genocide as "a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations."[2] The prosecutor for the ICTY noted that to reserve the character of genocide as the ultimate crime, "in the interests of international justice, genocide should not be diluted or belittled by too broad an interpretation . . . [I]t should be reserved only for acts of exceptional gravity and magnitude which shock the conscience of humankind."[3]

The Armenian genocide and the events of World War II led to the creation of the Genocide Convention (1948).[4] Yet the hope embodied in this document rapidly faded. The cry "never again" unfortunately gave way to the reality of "again and again." Many instances of genocide have occurred after the drafting and entry into force of the treaty. Examples of genocide not directly connected with international war are the intermittent (1959–1973 and 1988) massacres that took place in Burundi during intertribal fighting between the Tutsi and Hutu groups; the wholesale killing of Cambodians at the hands of their own government during the reign of Pol Pot; the reported mass killings of members of the Muslim minority in Chad in 1979;[5] and Saddam Hussein's campaign against the Kurds. At present, the situation in Darfur (Sudan) has caught the attention of the international community. One analyst noted that "five decades of non-enforcement have left the Genocide Convention's core terms shrouded in considerable ambiguity, making it that much easier for recalcitrant politicians to equivocate."[6] Antonio Cassese, who served as a judge on the ICTY, has asserted that "at the *enforcement* level the Convention has long proved a failure."[7]

Advocates often use the word "genocide" because they wish to emphasize the serious nature of a situation. Because of its genesis and close association with the events of the Holocaust, the word almost automatically evokes horrific images. In contrast, "crimes against humanity," which can be equally horrendous, lacks the built-in emotional connection and appeal to public opinion. The following statement from a highly respected journal of opinion illustrates the tendency: "What is happening in Darfur is genocide, and must be called that. The term 'genocide' not only captures the fundamental characteristics of the Khartoum government's intent and actions, it also invokes clear international obligations."[8] Yet, the International Commission of Inquiry on Darfur stated that "genocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide.*"[9]

The defendants at Nuremberg, if prosecuted today, would be charged with genocide, but Article 1 of the Genocide Convention makes it explicit that genocide can occur both in peacetime as well as in times of conflict. Although crimes against humanity and genocide share certain common elements, because of the special circumstances that define genocide, the two are very distinct and separate.[10] For easy reference and comparison, the core articles of the Genocide Convention (Articles 2 and 3) are as follows:

THE GENOCIDE CONVENTION

Article II

In the present Convention, genocide means any of the following acts committed with *intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

The victim in the crime of genocide is the *group*, not the individual members. The great difficulty stems from the fact that persons accused of genocide must be found guilty on the basis of *their own individual acts*, *but those acts must be connected in some manner* to a larger picture that provides the motivation for the individual acts. Simply explained, not every rape, murder, or other crime committed during a genocidal campaign is necessarily a crime connected to the larger context—that is, a crime committed with the appropriate *intent*. A rape or murder might be just an ordinary crime committed for reasons other than hatred of the particular group under attack.

The first sentence of Article 2 imposes two important elements necessary to defining that larger picture: intent to destroy in whole or in part, and the naming of specific groups—national, ethnical, racial, or religious. Only four groups receive protection from the Genocide Convention (and the ICC Statute).[11] As noted above, the convention does not contain extended definitions for the terms used. As social constructs, these groups may not have precisely defined boundaries that give them a purely "objective" existence. They do not form distinct categories but have considerable overlap. Some national legislation includes groups other than these four. The following gives a brief elaboration of the core ideas associated with each group.

1. *Ethnical group* members share a common language and culture. The group may be self-identified or identified through definition by others outside of the group.
2. *Racial group* members share hereditary physical traits. Often these coincide with a particular geographic area. These stand apart from religious, linguistic, national, or cultural factors.
3. *National group* members are not defined by the rather narrow ideas of legal citizenship. "National" in this context has a broader sociological-ethnographic connotation in the sense of an identity based on common origins.
4. *Religious group* means members share a set of core beliefs about spiritual ideals.

In his commentaries, Schabas makes two important points with respect to the problems of definition. First, he has pointed out that other international instruments have not expanded the list but rather treated the four categories as jointly defining protected groups.[12] For example, Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination, defines *racial* discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[13] Second, this approach does not require that a group must fit exactly into one or the other categories, however they are defined.

To foreshadow the discussion about the perils of the legal process, and the problems of application despite the obvious and overwhelming evidence of widespread slaughter, the ICTR Trial Chamber in the Akeyesu case[14] had great difficulty in determining whether the Tutsi formed a protected group under the terms of the Genocide Convention and the statute creating the court. For the layperson, the answer may seem obvious, but the Trial Chamber sought to apply the categories as inclusive and separate rather than complementary and overlapping. Hence, their definition of an ethnic group as one "whose members share a common language and culture" did not provide sufficient grounds to separate Tutsi from Hutu. At the time of the massacre, both tribes spoke the same language, and the cultural differences were minor. The judges finally relied on the fact that by law all Rwandans had to carry an identification card that specified Hutu or Tutsi to establish the necessary connection. While the Akayesu Trial Chamber may have created some difficulties for itself, the crisis in Darfur also illustrates the problems of determining a group in a manner that falls within the definitions of the convention.

Genocide and Crimes against Humanity

In theory, the number of victims has no bearing on whether killing on a large scale constitutes genocide. Genocide can comprise actions that impact a small tribe to the point of its disappearance as a distinct, identifiable group. *The crucial element is intent*. Still, numbers do become important for two rather disparate reasons—one based on a technical requirement, the other on a pragmatic necessity. Numbers are needed to determine the extent of damage and suffering to the group and also to draw outside attention to the problem. Still, one must ask, why does labeling the killing of 150,000 "genocide" make it more of a tragedy, more a situation that needs attention and response, than the killing of 150,000 not so characterized?

Crimes against humanity (CAH) do not require proof of intent. Simply, CAH constitute mass crimes committed against *any civilian* population. Those involved do not have to target a specific group, nor do they have to aim at destroying a group in whole or in part. Targets may comprise political or other groups not specifically named in Article II of the Genocide Convention. For example, persecution constitutes a crime encompassed within the Genocide Convention, but it also forms one of the offenses under CAH. Persecution related to genocide requires proving an "*intent* to destroy, in whole or in part, a *national, ethnical, racial or religious* group, as such."[15] This forms a much more daunting threshold of proof than required for a prosecution using CAH as the charge. In addition to killing, CAH may also involve enslavement/forced labor, forced displacement from home territory, mass rape, forced disappearance, and persecution through discriminatory laws or other regulations.[16] Gerhard Werle notes that *outside of armed conflicts, crimes against humanity usually involve one-sided acts on the part of governments or other organized armed groups*.[17]

Note also the brevity of the convention. It does not define any of the crimes listed with respect to what acts would constitute the offenses listed in the two articles. Nor does it include a scale of penalties or indicate a hierarchy of gravity. States parties to the convention have the obligation to pass appropriate and effective domestic legislation making genocide a crime. They also agree to making genocide an extraditable offense exempt from claims to "political motivation/asylum" (Article VII). Article VIII of the convention permits any state party to request "the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." The Security Council relied on Article VIII to authorize the ICTY (Yugoslavia), the ICTR (Rwanda), and other ad hoc courts. The convention places a primary duty to prosecute on the state where the genocide occurs, but it did foresee the possibility of other courts having jurisdiction as well. Though visualized in the convention, no *international* court with jurisdiction to try *individuals* accused of genocide existed until the UN Security Council authorized the ad hoc tribunals for Yugoslavia and Rwanda.

Not until a half century after the original draft of the convention opened for signature and ratification did a trial and conviction of an individual for crimes comprising genocide occur. In 1998, the ICTR found Jean-Paul Akayesu guilty of genocide and direct and public incitement to commit genocide.[18] Bosnia brought the first case alleging *collective responsibility* for genocide by Serbia to the ICJ in 1993.[19] *Note here that the victim state initiated the suit. No third party had stepped forward in defense of the norms embodied in the convention*. No action at the time was taken against the Pol Pot regime in Cambodia or against Saddam Hussein for his genocidal campaign against the Kurds.

PERSPECTIVE

The tag line of a song recorded by Bert Williams in 1919 gives one answer to the question posed by Samantha Power at the head of this chapter: "It's a wonderful chance for somebody, yeah somebody—somebody else, not me."[20] It also describes the early response to the crisis in Darfur. In making this analogy, I do not mean to trivialize the problem, nor demean decision-makers for lack of conscience. Consider the following statistics and recall the earlier comment that moral outrage alone is not sufficient to move governments to action. The United Nations defines major wars as military conflicts resulting in 1,000 battlefield deaths per year. In mid-2005, there were eight major wars under way with as many as two dozen ongoing lesser conflicts. This represented a decrease from 15 in 2003. Most of these conflicts were civil or *intrastate* wars. The intrastate character of many wars has often provided sufficient reason for outsiders to remain bystanders.

What sets these wars apart from wars in the past is the number of civilian casualties. During World War I, civilians made up fewer than 5 percent of all casualties. Today, 70 percent or more of those killed or wounded in most wars are noncombatants. Add to this the large numbers displaced or who suffer other traumas.[21] Conflicts have afflicted Africa to a greater extent than any other area. Since 1960, more than 20 major civil wars have taken place on the continent. Rwanda, Somalia, Angola, Sudan, Liberia, Sierra Leone, Burundi, Chad, Mali, the Democratic Republic of the Congo, Sudan, and Nigeria are among those countries that have suffered or at this writing have serious ongoing armed conflicts.[22]

We can complain that somebody ought to do something, but we need to understand that the response is often, "Yeah, somebody—somebody else not me." To understand why states and governments become bystanders requires an examination of the nature and essential features of the state system *and* the perspective of policy makers in trying to reconcile the demands of a domestic constituency with a presumed necessity of humanitarian intervention raised by a horrendous event in another country.

PRINCIPLES: PUBLIC INTERNATIONAL LAW

An understanding of the international politics associated with efforts to deal with mass atrocity requires a basic understanding of international legal structure and process and its relationship to international politics. One can be very skeptical about the effectiveness of international law. That skepticism raises an entirely different set of issues apart from this analysis. Even so, one can still be totally cynical in the cases of genocide and mass atrocity and conclude that international law comes into play only as an excuse not to take action. Even that statement means that law matters. To utilize an old proverb, "if hypocrisy is the homage that vice pays to virtue," then the virtues so honored merit our attention.

Start with the simple fact that individual states in the international political system are not responsible to any higher authority. The United Nations does not serve as an international legislature, nor does it have executive authority in the sense of independent enforcement capabilities. More importantly, the UN operates on a relatively limited financial base provided by member dues, assessments for approved peacekeeping operations, and voluntary contributions. According to the UN Charter, the "constitution" that governs its jurisdiction and capabilities, the organization has no authority to act unless an internal/intrastate war threatens *international* peace and security.

The UN does not have any responsibility to take action to enforce judgments made by either of the two international courts potentially open to universal membership: the International Court of Justice and the International Criminal Court. With one or two exceptions, states have the right to make their own decisions about how they will respond to various events. This includes decisions about joining specific legal regimes created by multilateral treaties (sometimes referred to as law-making treaties). *The international legal regime is not a unified, codified, top-down (vertical) system like domestic legal codes.* Instead, it mirrors the landscape of Antarctica—very jagged with open chasms and fissures often covered by tissue-thin layers of snow and ice that may look solid but have little real substance when tested. As in Antarctica, complications arise. Conditions change so that chasms and fissures can become temporarily bridgeable, but then others open.

Traditional international law forms a category distinct from international criminal law. Both bodies of law belong to the broader category of *public* international law or the law that governs the relations between states. A separate corpus of law, private international law (also termed "conflict of laws") consists of the conventions, legal guides, and other documents and instruments that regulate *private* relationships and transactions across national borders, such as the sale of goods and services. This book does not deal with private international law, although transactions across an international border involving property illegally seized during an episode involving genocide or crimes against humanity could potentially involve private law issues.[23] With the exception of war crimes, which have an older provenance, international criminal law as a separate identifiable body of obligations dates primarily from World War II.[24]

Collective Responsibility versus Individual Criminal Responsibility

Traditional international law textbooks emphasize that states as collective entities, not individuals, are the subjects of international law. The basic structure flows from the principle of sovereignty, which holds in theory that each state has an exclusive right to control its own territory without interference from other states. In the following passage from the *Lotus* case (France v. Turkey) the Permanent Court of International Justice (PCIJ) concisely described the structure of traditional international law as follows:

> International law governs relations between independent sovereign States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . Restrictions upon the independence of States cannot therefore be presumed. Now the first and foremost restriction imposed by international law upon a State is that barring a permissive rule to the contrary—*it may not exercise its power in any form in the territory of another State*.[25]

This implies a second important idea—that all states have formal equality with respect to the law. Hence Nauru (population 9,500) has exactly the same rights and duties as China (population 1,350,000,000+).

By definition, a law has to have human action as the basis of an obligation or benefit. The question becomes, what differentiates the structure of obligations under traditional international law from that which underpins international criminal law? Traditional international law rests on the idea of collective responsibility. International criminal law utilizes individual criminal liability, as does domestic criminal law. To understand how collective responsibility differs from individual criminal liability, let us first take a slight detour to use an analogy from domestic law. In domestic law, a corporation constitutes a *legal fiction* in that the corporation, as a *collective* entity, enjoys rights and benefits we normally associate with individuals. The corporation as a legal person may file lawsuits under its own name against other corporations and individuals, have a credit rating, negotiate contracts, apply for loans, or declare bankruptcy. Individual officers perform these tasks in the name of the corporation, but outside of criminal activity, they bear no individual liability for actions of the corporate entity.

Perhaps the easiest illustration involves how the law treats individual corporate executives during a bankruptcy proceeding. Clearly, the circumstances that lead to a declaration of bankruptcy involve the actions of human beings who have engaged in activities that failed to produce sufficient revenue to offset the financial indebtedness incurred. In the bankruptcy proceedings, the court considers only the financial assets of the corporation as a legal person, not the individual assets of the corporate officers. Simple incompetence or mismanagement does not mean individuals bear liability. Unless there is evidence of *criminal* wrongdoing—embezzlement or other fraudulent transactions, such as those associated with the *Enron* case—the liabilities belong to the corporation as a collective entity, not to any individuals who served in any capacity as responsible officers.[26]

When a violation of a legal obligation occurs in traditional international law, the responsibility to take timely and suitable action to *redress the breach* falls upon the abstract entity we call the state. In effect, this means the government then in power. If the officials of the offending government do not take appropriate measures to rectify the situation, actions to compel compliance or redress will be justified in terms of the collective responsibility of the state, not the individual responsibility of its agents. Again, think back to the previous example involving corporate responsibility. Government officials do not bear any "personal" liability under traditional international law. Such responsibility as they do have stems only from the positions they occupy. Hence, if undertaken, sanctions for breaches of international law will not be directed against the particular officials who failed to honor the obligation as individuals but against the collective entity called the state. To give an absurd example, but one that makes the point, failure to make the appropriate payments for rent on a U.S. military base in a foreign country does not give that country the right to file suit to attach the personal property of President Barack Obama to satisfy the debt. The debt belongs to the United States (the collective), not to President Obama personally.

In the *Avena* case (Mexico v. United States),[27] heard by the International Court of Justice, Mexico alleged that U.S. officials (local prosecutors) had failed to inform 51 Mexican nationals charged with capital murder of their right to meet with diplomatic officials from their home state (a violation of procedural law). The ICJ found in favor of Mexico, meaning that *the United States now had an obligation to take action to redress the breach.* The prosecutors and other officials involved in the cases bore no personal/individual responsibility for the failure to observe the treaty provision. They faced no sanctions other than the possibility of having to retry the cases.

In contrast, in 1998, a Spanish magistrate, alleging violations of the Genocide Convention, issued a warrant requesting the arrest and extradition of Augusto Pinochet from Britain. The warrant sought Pinochet for crimes committed against Spanish citizens in Chile during his tenure as head of state. Pinochet had come to Britain for medical treatment. The warrant embodied three novel features. *First, Pinochet faced a charge based directly on his actions as an individual.* The warrant named Pinochet, not Chile, as the responsible party. Second, according to traditional international law, heads of state enjoy immunity from prosecution for acts while in office. Because the warrant relied on the Genocide Convention, Pinochet could not claim immunity. Article 4 of the convention states: "Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Third, the warrant marked the first use of universal jurisdiction in conjunction with the Genocide Convention. Note that this simplifies this issue for the sake of illustration—the litigation in

Britain took 16 months and two hearings before the House of Lords to resolve.[28]

Traditional international law and international criminal law do overlap. The relationship is considerably more complex than suggested by the simple dichotomy between individual and collective responsibility. A quick survey would reveal that most of the individual offenses prohibited also constitute offenses under general (traditional) international law. In consequence, because Pinochet acted not as a private individual but as an agent for the state of Chile, his actions could potentially result in a situation where both bodies of law apply. Thus, in addition to Pinochet's personal liability, based on his alleged actions as head of state, Spain could sue Chile in the ICJ for appropriate reparations.[29] Consider that the trial of former Serbian president Slobodan Milošević before the International Criminal Tribunal for Yugoslavia for his alleged responsibility for atrocities in Croatia did not preclude Croatia from filing a suit against *Serbia* in the ICJ, alleging that *both* Milošević and the Serbian government were responsible for the policy of ethnic cleansing during the invasion.[30]

Immediately after Pinochet's detention, former U.S. secretary of state Henry Kissinger and Kenneth Roth, the executive director of Human Rights Watch, engaged in a debate in the pages of *Foreign Affairs*. The exchange highlights tension between the assumptions that underlie traditional international law and the continually evolving human rights regime that has at its core the principle of individual accountability. Equally, it vividly illustrates how responsible decision-makers think in contrast with how lawyers and judges think.

Kissinger wrote a scathing indictment of the principles the Spanish magistrate used to request the arrest and extradition of Pinochet. He feared that the Pinochet precedent would be open to political abuse and would severely hamper diplomacy and policy making because officials could now face the possibility that judicial authorities in other states who disagreed with particular policies might feel compelled to intervene by issuing arrest warrants. He argued that, on the one hand, those who commit war crimes or systematically violate human rights should be held accountable. On the other hand, he stated that no one should allow legal principles to be used as weapons to settle political scores. As an example of a possible result, he argued that the Pinochet precedent, if literally applied, would permit the two sides in the Arab–Israeli conflict, or those in any other passionate international controversy, to project their battles into the various national courts by pursuing adversaries with extradition requests.[31]

Seemingly in a confirmation of the primary concern he voiced in the *Foreign Affairs* article, when Kissinger subsequently visited London for a conference, Peter Tatchell, a British human rights campaigner, sought to have him arrested for alleged violations of the Geneva Conventions Act 1957, for the "killing, injuring and displacement" of millions of Vietnamese and

Cambodian people during the Vietnam War.[32] Activists have also sought international arrest warrants for former president George W. Bush and former secretary of defense Donald Rumsfeld, among others, for alleged war crimes and other treaty violations.[33]

Roth responded to the article by citing a number of areas where the practice of the United States, as well as that of other states, belied Kissinger's major concerns. Indeed, Roth argued, many of the hypothetical situations advanced by Kissinger have regularly occurred with few problems. Foreign states routinely assert jurisdiction over U.S. soldiers accused of crimes on the basis of current Status of Forces Agreements (SOFAs), and the United States extradites individuals, including citizens, to countries where defendants would not enjoy the constitutional guarantees associated with a trial in the United States. Roth argued that the fear of the ICC stems from a total misreading of its statute. Additionally, Roth contended that the Pinochet case did not result in a miscarriage of justice. While no system offers perfect guarantees, sufficient safeguards exist that would inhibit the actual occurrence of many of the scenarios advanced by Kissinger. Finally, citing the long-standing U.S. rhetoric supporting human rights and the rule of law, Roth argued that the United States should be embracing an international system of justice, even if it means that American actions might sometimes be scrutinized and criticized by others.[34]

POLITICS, PRINCIPLES, AND PRAGMATISM

The debate reflects the tension that exists between a viewpoint based on *political calculation as compared to one based on legal process.* The reader needs to keep this distinction firmly in mind. The *Avena* case *was not about outcomes.* The issue did not turn on the guilt or innocence of the 51 accused. It involved allegations of a *procedural error* that deprived these individuals of a legal right. Think about a common criticism of the U.S. Supreme Court here—the nine justices often seem more interested in perfect trials than in justice. In law, as in science, process is often as important as the principle involved. Lawyers and judges focus on standard process and relevant rules. *Judges and lawyers operate under entirely different modes of fact determination from the methods employed by diplomats and politicians engaged in the political process.* They are interested in process more than outcomes because of a belief that a proper process will produce the correct outcome. *Lawyers and judges must play by a standard set of rules that apply to every case, not by ad hoc calculations of interest based on the situation.*

Courts require proof adduced through application of a very strict set of rules. Such proof is not always readily available. For example, 35 years after the events in Cambodia, what problems will occur with finding credible testimony from witnesses and in securing relevant documents to support specific cases? Finding credible witnesses to mass atrocity cases can be problematic. Difficulty in accessing relevant sources may have inhibited investigators. Even years after an occurrence, governments deny or distort the historical record. They reject requests for access to archives that contain relevant documents, or the documents may have been destroyed. Eyewitness accounts may yield valuable evidence, but these depend on the willingness of observers to give information or other documentation and on having access to survivors. Political, logistical, and administrative barriers limit the possibilities for collecting relevant information. Consider the simple fact that some trials at the ICTY involve providing translations of all documents in as many as five languages.

Participants in, and victims of, genocide have obvious reasons for not cooperating. If they do give information and stay in their homeland, they could face harassment, prosecution, or perhaps simply “disappear.” If they emigrate, they could face prosecution as well. On the survivor side, testimony will be colored by the simple fact that documenting the events was not something on their mind as they struggled to survive. Moreover, they may be extremely wary of strangers who wish to question them, or they may still live under the same regime that committed the atrocities.[35]

Sometimes courts find that some rules do not apply. Much to the dismay of many human rights advocates, the ICTY initially acquitted Duško Tadić, the first defendant before the ICTY, on seven murder charges for lack of evidence. The judges then dismissed 11 of 31 charges against him on the grounds that he could not have violated the Geneva Conventions because the war in Bosnia did not meet the test of an international conflict, hence the indictment included charges not sustainable in the relevant law.[36]

From the viewpoint of those involved in the political process, , Stanley Hoffmann, in a criticism of the Carter administration’s foreign policy emphasis on human rights, argued that fine principles matter less than the correct strategy.[37] Hoffmann did not mean to suggest that human rights were unimportant but that as objectives they needed to be part of an overall strategy that integrated human rights into the broader goals of U.S. policy. Because political leaders like Kissinger will ultimately be held responsible for the results, they value flexibility. They see having to jump through preordained hoops demanded by a set of standard requirements in order to satisfy some standard of “fairness” as an unwanted obstacle.

Kissinger’s arguments and Hoffmann’s comment remind us that foreign policy decisions involve assessing risks and weighing priorities. Because many courses of action will affect others as well as the decision-maker’s own state, political advisers must take into account the views of allies, adversaries, and perhaps interested third-party onlookers about what constitutes a wise course of action within the parameters of specific incidents. Will a particular course of action incur approval, acquiescence, or resistance from other governments? More importantly, intervention will require the expenditure of blood and treasure, to use a graphic phrase.

These are very precious commodities, not unlimited resources. Consider the events that led up to World War II. The policy of appeasement pursued by Neville Chamberlain, then prime minister of Great Britain, that resulted in the now-infamous deal made with Hitler at Munich to partition Czechoslovakia is often cited as a principal factor in encouraging Hitler to go to war. Indeed, "Remember Munich" became the prime directive of Western policy and diplomacy during the Cold War. Yet, Chamberlain's concerns and reasoning serve as a good illustration of factors that condition decisions that could lead to the use of force requiring the expenditure of treasure and, potentially, blood. Churchill, who argued for an aggressive stand against Hitler, did not represent British public opinion at the time.[38]

The bloodshed in World War I changed forever the way in which policy makers and the public viewed war and the use of force. Between World War I and World War II, the specter of any event that might lead to another major conflict haunted policy makers in Western Europe (other than in Germany after 1933) and the United States. The economic situation weighed heavily as well. The Great Depression had affected the entire industrialized world, not just the United States, and World War I had severely damaged British trade even before the Depression. Britain had begun a major rearmament effort in 1936 despite the slow economic recovery. One other important factor came into play as well: Chamberlain faced a situation where he might have stood alone in resisting Hitler's demands. He was not willing to risk the possibility of another war if the full burden fell solely on Britain.[39]

Chamberlain reflected the mood of the country when he spoke to the House of Commons after the Munich Agreement. He will be forever remembered for the following quote, which, taken out of context, suggests indifference. In context, while unfortunately phrased, it reflects a deep-seated fear of another major war: "How horrible, fantastic, incredible it is that we should be digging trenches and trying on gas masks here because of a quarrel in a far-away country between people of whom we know nothing."[40]

One should never lose sight of the simple fact that intervention involves risks and major costs in terms of money and manpower. In hindsight, not only Chamberlain but many others totally misread Hitler's intentions, and the question will always remain, would a different response have produced a different long-range result? In Chamberlain's words, political leaders must decide where a "quarrel in a far-away country" ranks among other priorities that entail commitment of blood and treasure, and what further risks and commitments there might be in electing to take action. Think about the number of ongoing internal conflicts in the last few years that have produced major casualties. How much blood and treasure would it have taken to address each one, and from whom? Who should decide when to intervene and on what criteria? Who pays?

Enforcement

Inevitably, the question of enforcement arises because the international context lacks all of the features that we commonly associate with the rule of law at the domestic level. One of the obvious weaknesses of international law and organization stems from its obvious ineffectiveness with respect to preventing and managing violent conflicts. No international police force exists as an independent agency charged with investigating and prosecuting violations. Enforcement still depends on the *will* of individual states to take action or authorize the UN to do so. Apart from the newly formed ICC, no other permanent international criminal tribunals exist. The ad hoc courts established under the auspices of the United Nations—the ICTY, ICTR, Special Court for Sierra Leone, and the Special Tribunal for Cambodia—have limited jurisdiction in terms of time frames, territoriality, and defined crimes, as well as a limited institutional life. *They cannot try alleged crimes that fall outside of their constitutive charters.* Even though it is a permanent court, the ICC also must operate within the terms of the Rome Statute, the treaty that defines its jurisdiction.

Treaties and customary law may contain prohibitions against certain actions, such as deliberate attacks on civilians, but usually fail to define other essential elements necessary to turn a prohibition into an enforceable rule. From a legal standpoint, simple lists do not suffice. What specific acts under what specific circumstances fall under the prohibition? Further, the relevant law might fail to define what consequences should follow from specific violations or to elaborate the important *procedural* elements necessary for prosecution.[41] Many treaties lack any provisions for enforcement at all, leaving it to states to fill in the blanks if they choose to do so. Even more interesting, neither the authorizing resolutions for the ad hoc international courts nor the Rome Statute of the ICC contain a scale of penalties. They grant authorization to try certain crimes committed under certain circumstances but then do not deal with appropriate punishment for those who are found guilty.

To complicate matters further, only 123 states have ratified (joined) the treaty that established the ICC. In contrast, the membership of the United Nations currently stands at 193 states. This means a significant minority of the UN membership has not accepted the ICC as a valid institution. Three of the five permanent members of the UN Security Council—Russia, China, and the United States—have not ratified the ICC Statute. All three have ratified the Genocide Convention, a crime included within the ICC's potential jurisdiction. The Genocide Convention has been ratified by 142 states. This leads to an anomalous situation. The United States, Russia, and China have formally agreed that genocide constitutes an international crime and that genocide has occurred in a specific case, but they have not taken steps to accept an international tribunal that has authority and jurisdiction to try individuals so accused.

Relevant treaties also lack a uniform approach to the problems addressed. In part, this can be attributed to the disjointed and lengthy process of development. Individuals in different eras have different ideas about what is necessary and what is possible. Progress in the international milieu requires a productive interaction of idealism and pragmatism. Without idealism to set goals that transcend the demands of the immediate defined by the narrow self-interest of particular states, the essential exchanges in political interaction would remain on the most elemental level. Without a leavening dialectic with the "art of the possible"—the traditions gleaned from conservative statesmanship and experience[42]—ideals would remain undeveloped, ethereal, and isolated from political experience. The tension between the two reflected in the ebb and flow of decisions ensures that the mix at any specific time will never fully satisfy advocates of either position. Yet any idea of progress must take into account both. Because diplomats and political officials, not lawyers, tend to have the responsibility of drafting and securing approval of various conventions, these almost always fall short of the ideal advocated by reformers. Even if lawyers review or do draft the text, one must never lose sight of the fact that *ratification/accession* involves a *political process*. Considering this, attempts to deal with perceived threats often fail to produce relevant agreements. Aggression in the aftermath of WWII, narcotics in the 1970s and 1980s, and terrorism currently, serve as the most salient examples.[43]

No correlation exists between the nature of the subject matter and the number of relevant treaty instruments. Perceived seriousness of the crime does not necessarily mean more treaty instruments. M. Cherif Bassiouni has identified 281 conventions/treaties covering 28 categories of criminal behavior: 70 deal with war crimes, 54 with aggression.[44] Although the treaties that set up the ICTY, ICTR, and the ICC have included language defining genocide for the purposes of the tribunal, there is still only *one* general international agreement that deals with genocide.[45]

Talk and declarations of intent are cheap. Effective intervention is not. The reluctance to engage in a timely fashion remains the Achilles heel of effective prevention. Still, states easily support the principles of prevention. Fifty-five countries, including the United States, United Kingdom, Canada, France, Germany, Japan, and Russia, signed the Stockholm Declaration on Genocide Prevention in January 2004 just as the situation in Darfur came to world attention. The signatory states pledged to cooperate in developing early-detection mechanisms and committed to *support research* into methods of prevention and to *explore* "seriously and actively, the options presented at the Forum for action against genocidal threats, mass murders, deadly conflicts, ethnic cleansing as well as genocidal ideologies and incitement to genocide."[46] Although many human rights advocates hailed it as the most significant step forward since the signing of the Genocide Convention in 1948, as a declaration, the document has no legal force. The issue remains one of political will and resources.

POLITICS OFTEN RULES

Given the discussion above, we need to examine the question of what inhibits states from undertaking action in response to obvious instances of mass atrocity. A simple set of answers will suffice here. All law has political content because it results from a political process, something often overlooked.[47] *Law determines not only crimes but regulates other priorities, such as equity decisions about who should benefit from government services.* International criminal law in general, and the Genocide Convention in particular, has a very high political content. Six factors condition state responses to perceived violations:

1. Assumptions about sovereignty that have produced what many have termed the "culture of impunity"
2. Perceptions of possible reciprocal action; Vattel's golden rule of sovereigns holds that "no one can complain when he is treated as he has treated others"
3. The expenditure of scarce resources on something not seen as an important national interest
4. Conflicting goals and priorities; policies based on pragmatism and perceived necessity of the moment might not coincide with desires to "see justice done," or addressing one crisis might inhibit the ability to deal with another
5. Charges of discrimination—that enforcement is only against the weak
6. Claims of immunity or local grants of amnesty that impede international action

First, the sovereign state still forms the most important element in any effort to enforce international law. The "hard shell" idea of sovereignty, often reinforced by strong feelings of nationalism, still exerts a powerful pull. A fundamental tension exists between evolving human rights regimes that assert that all human beings have certain minimum rights and the idea that the relationship between a government and its subjects is solely a matter of domestic, not international, concern. Many of the concerns discussed stem from knowledge that for many years, mistreatment of subjects or citizens by their own government fell within "domestic jurisdiction." After World War I, many new states were created out of lands formerly under the governance of the Ottoman Empire or Czarist Russia. As a condition of receiving the formal recognition of their independence by the major Western powers (Britain, France, and the United States) necessary for admission into the League of Nations, all the newly minted states had to sign treaties that guaranteed humane treatment of minorities within their borders.[48] The countries subject to the treaties saw the requirement as an undue and unwanted limitation on their sovereignty and as a judgment on their competence to manage their own affairs. The unequal nature of the treaties also rankled because those imposing the requirements were not themselves subject to the same rules, hence the conclusion that minority rights were not seen as universal obligations. The same perceptions of unequal treatment and discrimination have surfaced with respect to events since World War II, particularly with respect to allegations of human rights violations and prosecutions for war crimes.

Second, those experienced in the ways of the world intuitively understand the idea expressed in the old adage "What is sauce for the goose is sauce for the gander." Intervention into the internal affairs of others might invite criticism and justify, in turn, intervention by others into one's own affairs. A century and a half ago, in a remarkably prescient statement directed at the avidness with which certain congressmen advocated overt support for Louis Kossuth, the leader of the Hungarian revolution, Henry Clay eloquently pointed out the dilemmas involved in an active interventionist human rights policy. He noted that in undertaking such ventures, the United States would expose itself "to the reaction of foreign Powers, who, when they see us assuming to judge of their conduct, will undertake in their turn to judge of our conduct."[49] This observation still underlies the reluctance of the United States to join the International Criminal Court. A recent commentary on international humanitarian law noted: "But the vast armature of international humanitarian law has stood largely mute, palsied in part by the fear of most national governing elites . . . that the glare of such attention might one day be turned on their own actions."[50]

Third, as noted earlier, enforcement requires expenditures of resources, both tangible in the form of manpower, materiel, and money, and intangible in the sense of reputation and public support. For governments, immediate self-interest will tend to override arguments based on the good of the international community. Rhetorical support for peace, nondiscrimination, and other human rights values comes easily, but rhetoric and reality often clash when circumstances require intervention to address a major breach of "community" obligations, such as the ongoing situation in Darfur (Sudan). A response here would necessitate a major commitment of resources to a problem that does not directly affect the self-interest of states outside the immediate area. This explains the reluctance of states to engage in Bosnia and Rwanda in a timely fashion. Judge Antonio Cassese, who served on the ICTY, has concluded that "a strong reaction by States to these breaches presupposes the existence of a community interest to put a stop to them. However, the community interest in their fulfillment remains potential rather than real."[51]

Fourth, situations do not exist in a vacuum. In Bosnia, a considerable tension did exist between the goals of those engaged in negotiating a cease-fire and the efforts of the ICTY, whose task was to arrest and try many of the individuals involved in the negotiations for war crimes. From the point of view of the diplomats trying to negotiate the cease-fire, the activities of the court undermined the peace process. The indictments of many high-ranking individuals, who were both involved in the conflict and essential to the negotiations, provided good reasons for continued noncooperation. Those trying to bring the conflict to an end felt that the immediate pragmatic objective of saving lives by muting or ending the conflict had a considerably higher priority than the more abstract and longer-range goal of punishing those responsible for condoning or committing atrocities. In Sudan, attention was focused on negotiating an end to the long-standing North–South secessionist conflict when the situation in Darfur began. A slightly different dilemma arose. Would putting pressure on the government in Khartoum with respect to Darfur retard progress in the South Sudan negotiations? *After the peace was signed, the dilemma became what to do because the continuing crimes in Darfur were the work of the same people who were now supposed to implement the peace accord.*

Priorities can structure responses in another way. During the Cold War, the United States supported many governments because they were seen as important allies against enemies or had other strategic value. Pinochet in Argentina and Saddam Hussein in Iraq stand as examples. Pinochet, and other leaders in Africa and Central and South America, were given a pass on their human rights records because they were seen as staunchly anti-Communist. Saddam Hussein became a client because Iraq had a double value—huge oil reserves and hostility to the Khomeini revolution after the seizure of the U.S. embassy in Tehran and subsequent events. Because of his opposition to Muammar Gaddafi (Libya) and his regional drive for dominance, the United States also supported Hissène Habré in Chad. Russia had a special interest in Serbia, and as a permanent member of the UN Security Council could veto any action it considered adverse.

Fifth, the charges of discrimination have found resonance in that application in terms of prosecution seems only to happen to individuals from smaller, weaker states.[52] From this perspective, critics assert that Henry Kissinger, Robert McNamara, Tony Blair, Donald Rumsfeld, Madeleine Albright, George W. Bush, Bill Clinton, and others have enjoyed immunity from prosecution for their alleged crimes only because they were fortunate enough to be agents for very powerful countries. Advocates argue that when major states are involved, "what is sauce for the poor geese" is *never* "sauce for the rich and powerful ganders" because they can impose their will and judgment on the weak with little fear that others will call them, or those allied or otherwise protected by them, to account for their own misdeeds. Thus, Palestinian allegations against the Israelis, complaints about

American forces in Afghanistan, or the plight of the Chechens escape examination and possible action, while individuals from African states are singled out for their alleged misdeeds.[53]

Finally, national policies and legislation can inhibit application. Policies of amnesty might preclude international action.[54] Statutes of limitations and grants of immunity might further impede international action. These need not be absolute bars but do raise additional hurdles. Occasionally, international courts have considered the national legislation as invalid because it contravened rights guaranteed by international human rights law. This occurred recently (2001) in the *Barrios Altos* case before the Inter-American Court of Human Rights.[55] The court concluded that self-amnesty laws are "manifestly incompatible" with the aims and spirit of the convention because they "lead to the defenselessness of victims and perpetuate impunity."

The statute of the ICC and the Genocide Convention do not permit claims of immunity as a defense against prosecution. The ICC has indicted Omar Hassan Ahmad al-Bashir, the president of Sudan, on three counts of genocide and five counts of crimes against humanity for his role in the Darfur situation. The court has issued an arrest warrant. The ICTY (Yugoslavia), ICTR (Rwanda), and other ad hoc international courts also refused to honor claims of immunity as a defense. The International Court of Justice (ICJ) recently ruled that by refusing to prosecute Hissène Habré, former president of the Republic of Chad, and then by refusing to honor Belgium's request for extradition, Senegal had violated its obligations under the Convention against Torture.[56] Human Rights Watch, among other observers, had accused Habré of thousands of political killings and systematic torture during his presidency, from 1982 to 1990. Senegal responded to the decision by working with the African Union to create a special court within the Senegalese judicial system (Extraordinary African Chambers) to conduct the trial. The pretrial phase of evidence gathering took 15 months. The trial commenced on July 20, 2015 and ended May 30, 2016 with a conviction and life sentence.[57]

Using the corporate analogy again, immunities attach to the office, not to the individual. An ICJ decision in 2002 held that the arrest warrant issued by Belgium against Abdoulaye Yerodia Ndombasi failed to respect the immunity from criminal jurisdiction that the then *currently serving* minister for foreign affairs of the Congo enjoyed under international law.[58] The question in the *Ndombasi* case involved the authority of an *individual state* to claim universal jurisdiction as a basis for seeking the arrest and extradition of officials of another state while they still hold office. The decision flows directly from the primary rule of sovereign independence that states that no *state* has the authority to exercise any form of jurisdiction over the decisions of another state with regard to internal policy unless some form of agreement (treaty agreement) permits such action. As discussed earlier, the fear of granting such authority underlies much of the United States' opposition to joining the International Criminal Court.

The United States and the Genocide Convention

When dealing with the ideas that underlie the rise to prominence of the international human rights movement, one cannot ignore the central role played by the United States in placing and keeping human rights as items of consequence on the contemporary agenda of concerns among states. Within the American justice system, questions of individual rights dominate constitutional jurisprudence. Since the Carter administration, presidents have routinely declared that a dedication to human rights constitutes a fundamental tenet of American foreign policy. Yet, in comparison with many other democracies, the United States has only a very modest record when it comes to formal adoption of international human rights conventions. Over the years, the arguments against U.S. ratification of the Genocide Convention have involved a mix of technical considerations, emotional appeals, and special pleading based on perceptions of internal political imperatives.[59] Indeed, although an international proponent of the Genocide Convention, it took the U.S. Senate 40 years to ratify the treaty. Even then, it did so with a "sovereignty package" that effectively ensured the treaty would not have effect within the United States.[60] The implementing legislation effectively gutted the main object and purpose of the treaty. It reservesall judgments about situations that occur within various venues over which the United States claims to exercise sovereign jurisdiction to U.S. authorities.

The American record on international human rights displays two complementary attitudes: a deep pride in the accomplishments reflected in the Constitution and Bill of Rights and an unwillingness to subject American practice to any type of examination and criticism by non-Americans. Professor Louis Sohn has cut to the heart of American concerns:

> I think on the one hand we always say to everybody else that our standards are higher than those of anyone else; but we will discover if we are subject to international supervision, that there are some skeletons in our closet and they will be paraded in public, and we do not like that idea.[61]

The United Nations: The Politics of Collective Action

In a 2004 commentary on Darfur, *The Economist* accused the international community of "shuffling papers while Africans die."[62] This places responsibility where it belongs. Many observers have mistakenly faulted the UN for its lack of timely responses to situations that involve genocide and mass atrocity. The criticism is misplaced. If the UN has failed to take action, *it is because the constituent member states do not wish to take action*, no matter the public rhetoric used. The secretary-general has no independent authority to initiate a peacekeeping/peacemaking mission without a vote of authorization by the Security Council and appropriate action in providing resources through votes in the General Assembly. The member states control the organization; the organization has no independent power to compel the member states to commit to ventures they have not formally approved. Some agencies may initiate humanitarian relief efforts, but this requires raising money from voluntary donors, most usually the same states who would have to authorize more direct actions to deal with the situation. Member governments often find this a preferable option to authorizing "political" or more intrusive measures, such as a peacekeeping force.

We should note as well that the political landscape since World War II has never mirrored the assumptions underlying the UN Charter paradigm. Those drafting the charter looked back to the human and material costs of World War I and World War II, not forward to the disintegration of colonial empires and the problems that would ensue. They looked to what they perceived as the appropriate lessons of the past to furnish a guide to the future. Evaluating the weaknesses of the League of Nations and the patterns of violence in the interwar years, they sought to create a comprehensive system of international security in which small states could feel secure. The hope was to create a system that could move quickly to prevent—or failing prevention, to resolve—conflict. The design took the state and state sovereignty as the essential elements—only sovereign states qualified for membership. The principle duties and scope of authority related *only* to conflicts *between* states.

The divisive nature of the postwar world has inhibited the ability of the UN to respond as ideally planned, but so did the unexpected nature of the issues. The unanimity required for productive Security Council deliberation and action quickly fell prey to Cold War politics. But equally important, the charter was constructed to deal with challenges that involved disputes between two territorial states, not the types of internal conflicts that emerged as colonial empires disintegrated and postindependence internal/civil wars of succession flared. The political dynamics of self-determination displaced interstate war as a principle concern. The new states jealously resisted any policy that would diminish their freshly minted sovereignty. Nonstate actors began to play major roles, sometimes as initiators of low-intensity military conflict (guerrilla war) across borders against incumbent governments. At the same time, emerging human rights regimes challenged the old hard-shell conception of sovereignty that held that governments had absolute authority to do as they pleased within their own domestic borders. The debate still continues over what actions give rise to justifiable initiatives to protect internationally guaranteed human rights as opposed to being characterized as illegal intervention.[63] The United Nations, fundamentally based on a statist foundation, faced demands to support and promote policies that transcended state claims to absolute primacy within their own borders.

Because of the Cold War (East–West conflict) and the issue that emerged from the anticolonial movement and its aftermath (North–South conflict), the UN never lived up to the hopes of the framers. The 1950 decision to respond to a North Korean attack on South Korea (ROK) happened only because the U.S.S.R. was absent when the initial Security Council vote was taken. The campaign was fought primarily by U.S. and ROK troops under a U.S. commander. Not until Iraq invaded Kuwait (the Gulf War) in the summer of 1990 did the UN again sponsor a military effort to counter an invasion. Though authorized by the UN, and with troop contingents from many different countries, the operation again was carried out under U.S., not UN, command. Articles 43–47 in Chapter VII that authorize forces under UN command have never been utilized.

Peacekeeping and Peace Enforcement

The UN Charter does not contain the word "peacekeeping," nor does it contain any language that suggests the procedures that have evolved, other than that committing states to peaceful means of settling disputes. Peacekeeping has taken many different forms. These have reflected the very diverse situations that have occurred. Actions have ranged from unarmed observation teams sent to monitor cease-fire agreements in the India–Pakistani conflict (United Nations Military Observer Group in India and Pakistan) and the first Arab–Israeli War (United Nations Truce Supervision Observation) to the commitment of 20,000 troops sent to keep the newly independent Congo from being partitioned (Opération des Nations Unies au Congo) after receiving its independence from Belgium. The first armed peacekeeping mission (United Nations Emergency Force) was deployed in October 1956 to maintain a cease-fire between Israel, Britain, and France on one side and Egypt on the other. The general idea was to station lightly armed UN forces between the opposing hostile forces in order to permit negotiations or other activities, such as troop withdrawals, to take place.[64]

After the disaster of ONUC (the Congo, 1960–1964), peacekeeping was not a major concern until the turmoil that occurred with the end of the Cold War. Between deployment in Cyprus (United Nations Peacekeeping Force in Cyprus) and 1986, the UN authorized only five operations, three of which dealt with the continuing Arab–Israeli conflict (United Nations Emergency Force II, United Nations Disengagement Observer Force—Golan Heights, and the United Nations Interim Force in Lebanon. In the next seven years, 1987 to 1994, the Security Council quadrupled the number of resolutions it issued, tripled the peacekeeping operations it authorized, and multiplied by seven the number of economic sanctions it imposed per year.[65] The annual budget for peacekeeping increased from $250 million to $3.5 billion.[66] Michael Doyle and Nicholas Sambanis argue that

> the rules as to what constitutes intervention and what constitutes international protection of basic human rights shifted as well. The traditional borders between sovereign consent and intervention were blurred . . . A newly functioning United Nations . . . was seen to be a legitimate agent to decide when sovereignty was and was not violated.[67]

Other regional organizations, the Organization of American States (OAS) and the Organization of African Unity (OAU, now the African Union or AU), have adopted "operational" rules of sovereignty that define basic responsibilities of governments. Presumably these set up benchmarks to determine when intervention is permissible.[68]

Three basic principles have underpinned UN peacekeeping operations from UNEF (1956) to the present: consent of the parties, impartiality, and nonuse of force except in self-defense or as necessary to fulfill the mandate.[69] For peacekeepers, any use of force should be considered a measure of last resort. If force becomes necessary, it should be limited to the minimum level needed to accomplish the desired end while maintaining the overall goals of the mission and mandate.[70] These principles have sometimes undermined the effectiveness of peacekeeping operations, as in Sierra Leone, where the requirement of impartiality produced a situation that mandated an unworkable partnership from the beginning. Operations have also suffered from imprecise and vague mandates, deficiencies in planning and funding, ill-trained troops, and availability of timely intelligence.

A considerable gap between premise and promise exists. First, peacekeeping is very expensive. The budget for fiscal year 2012–2013 was $7.2 billion dollars.[71] Conflicts of interest among the five permanent members of the Security Council, issues and costs of funding, the prevalence of internal wars, the shadow of the failure in Somalia, uncooperative governments, unprofessional troops as peacekeepers, and inadequate operational mandates have hampered collective efforts.

The peacekeeping–peacemaking relationship has been a critical one for policy makers in setting up the mandates that control what actions a UN force may take. So have issues of timing. For example, leading UN member states resisted deploying a peacekeeping force into the Congo in 1999 until a peace agreement was in place between warring factions (and neighboring states). During the interim, many civilians died and a comprehensive peace agreement proved elusive. When it finally came, it did not hold for very long. Peacekeepers might have promoted such a peace agreement earlier, and perhaps one that was more successfully implemented. Still, considering the negative side, peacekeeping forces could actually hamper conflict-resolution efforts by removing incentives for continuing negotiation. If this occurs, keeping the peace will require continued deployment with all its political and financial implications. This has been the standard critique of UN peacekeeping forces in Cyprus (UNFICYP, since 1964) and on the Golan Heights (UNDOF, since 1974).

Peacekeeping forces, when deployed, have often found themselves in situations where parties have not yet given up on armed force or the commissions of atrocities as a means of accomplishing objectives.[72] Doyle and Sambanis summarize the reasons for failure of the mission in Rwanda:

> Unfortunately, it [UNAMIR—UN mission in Rwanda] was dispatched without a concept of operations that bore a resemblance to the situation on the ground. A woefully underresourced peacebuilding mission premised on the comprehensive consent of the parties was sent to implement a peace that could not have been more flimsy, if it was not illusory from the moment it was signed.[73]

Simply, a mission cannot keep peace if there is no peace to be kept, or if it lacks appropriate resources, or if it has instructions that do not mandate action appropriate to the "ground truth" of the situation. In this case, the peacekeeping effort in Rwanda suffered from all three. At the beginning, so did the effort in Darfur.

DEFINITIONS, DECISIONS, RESOURCES, AND PRIORITIES: DARFUR

Darfur offers a recent case study that illustrates many of the problems discussed above. First, in terms of priorities, in 2003, the attacks in Darfur emerged as a sideshow to the ongoing civil war between the government in Khartoum and rebels in the south. The conflict had originally begun in 1955, shortly before Great Britain consented to formal independence for the colony in 1956. The first civil war initially had its roots in ethnic and religious differences (often described as Arab/Islam versus African/Christian) although many observers have felt this characterization oversimplified the issues.[74] An agreement in 1972, the Addis Ababa Accords, created the Southern Sudan Autonomous Region. A new constitution incorporated the provisions of the agreement.

Discovery of oil in lands straddling the border with South Sudan led to the renunciation of the agreement by the Khartoum government in 1983 by declaring Sudan a unitary Islamic state. Almost immediately, conflict with the south resumed, spearheaded by the Sudan People's Liberation Army (SPLA) led by John Garang.[75] By the time the attacks in Darfur began, the conflict between Khartoum and South Sudan ranked as the longest ongoing civil war in modern history. Before the end of the conflict in a 2005 cease-fire, estimates put deaths (predominantly civilian) at over 2 million, with another 4 million people displaced.[76] The Republic of South Sudan declared its independence in July 2011.

Second, the civil war took priority with regard to humanitarian funding. In October 2002, the U.S. Congress passed the Sudan Peace Act (Pub.L. 107–245) condemning the Khartoum government for committing genocide. It provided $100 million a year for three years in *humanitarian aid* to assist populations outside the scope of the Sudanese government's control. Overall, by 2011, the United States had contributed more than $8 billion in development and humanitarian aid.[77] By 2012, the European Union had provided $811 million (since 2005), and $967 million more in humanitarian aid since 2003.[78] Note that states were willing to commit their "treasure," but not their "blood."

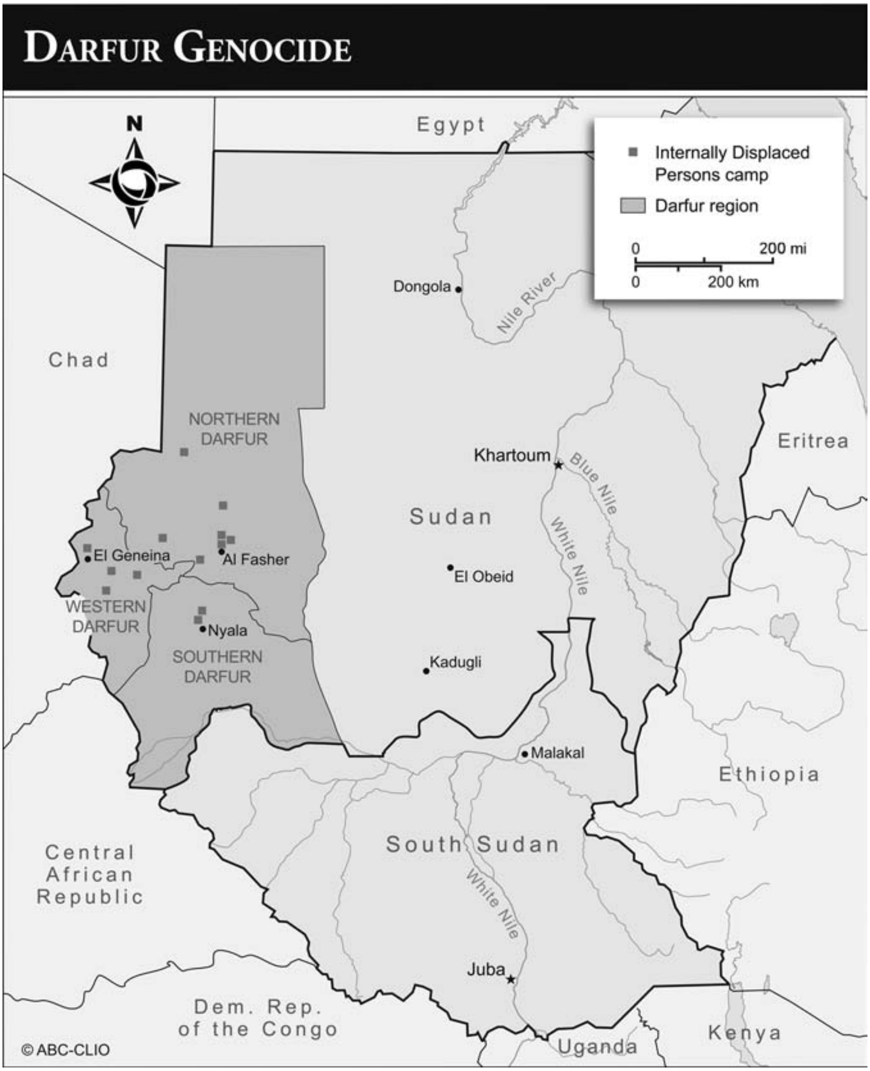
Third, as in the former Yugoslavia, the diplomatic dilemma complicated the issues. Those who were seen as responsible for many of the atrocities were also those who would be essential participants in any negotiations for a cease-fire or peace agreement. States did not wish to take any action that might provide reasons for noncooperation. To repeat a point made earlier, Darfur proved a continuing problem because the individuals representing the Khartoum government (the north) who had promised to implement the cease-fire/peace agreement in 2005 were the same individuals who were responsible for the situation in Darfur.

Issues in Darfur

The media and others used the word "genocide" to describe the ongoing situation in Darfur from the time it surfaced as an international issue. Darfur occupies territory with an area somewhat larger than that of Colorado and Wyoming combined (213,000 square miles; see Map 2.1). It has about 6 million inhabitants divided into nearly 100 tribes. Some are nomads; some are farmers. Unlike the participants in the Khartoum government–Southern Sudan civil war, all tribes embrace Islam. In 1989, General Omar al-Bashir took control of Sudan by military coup, which then allowed the National Islamic Front government to stir up tensions in the region. A struggle for political control of the area began. Weapons poured into Darfur. A low-level conflict between farmers (often described as African) and nomads (described as Arabic) slowly escalated.[79]

Outrage about government indifference toward the problems of the area and the failure to protect the settled farmers from attacks by nomads generated two rebel movements, the Sudan Liberation Army and the Justice and Equality Movement.[80] In 2003, the two groups began an open armed movement against the Sudanese government. The government of Sudan

Map 2.1


DARFUR GENOCIDE
N
Internally Displaced Persons camp
Darfur region
0 200 mi
0 200 km
Egypt
Chad
Dongola
Nile River
NORTHERN DARFUR
Khartoum
Blue Nile
White Nile
Eritrea
Sudan
El Geneina
Al Fasher
El Obeid
WESTERN DARFUR
Nyala
SOUTHERN DARFUR
Kadugli
Malakal
Ethiopia
South Sudan
Central African Republic
White Nile
Juba
Dem. Rep. of the Congo
Uganda
Kenya
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responded by condoning attacks on the civilian population by Arab militias known as "Janjaweed," or "devils on horseback." Sudanese forces and Janjaweed militia attacked settlements throughout Darfur, destroying over 400 villages and forcing large numbers of civilians to flee their homes.[81]

Few outside the government of Sudan disputed the evidence of large-scale, indiscriminate killing. The problem with the categorization of the conflict as genocide depends on whether the African-versus-Arab characterization sufficiently distinguishes attackers from victims. The problem stems from the fact that the victims do not make up ethnic, racial, or religious groups distinct from those mounting the attacks. Gérard Prunier describes it as "the ambiguous genocide."[82] The groups share religion and language, although increasingly the divide has been characterized as between "Arabs," who support the government, and "Africans," who do not. The UN Commission established to investigate concluded:

> The various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim). In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them. It is also notable that members of the African tribes speak their own dialect in addition to Arabic, while members of Arab tribes only speak Arabic.[83]

At the time, some characterized the report as intentionally disingenuous, meant to justify the status quo rather than taking action to intervene in a more vigorous fashion. No one disputed that crimes had been committed. The debate centered on how best to deal with the issues. The question of characterization—as genocide or not—seemed a diversion to delay taking action.

An op-ed in the *Christian Science Monitor* argued that the drive to label the conflict as genocide had actually hurt efforts to bring peace to the area because the portrayal underplays the complexity of the situation. The term "genocide" suggests a clear-cut Manichean division between evil perpetrators and innocent victims. The situation is considerably more complex:

> Using the term "genocide" implies that there is a unidirectional crime taking place. To be clear, horrible crimes have been committed, but the perpetrators aren't as clear-cut as the term would make it seem. The government of Sudan has killed many people and is responsible for war crimes in Darfur, but the rebel insurgents bear some responsibility, too . . . Had "genocide" not been the focus, activist campaigns might have challenged the rebel groups and checked their criminal acts.[84]

Attacks against non-Arab groups accused of supporting the rebellion dominated the first wave of major fighting (2003–2005). Government-sponsored Arab groups were responsible. This led to thousands of civilian deaths and the displacement of hundreds of thousands of people. The conflict has resulted in an estimated 300,000+ deaths and another 3 million displaced, both internally and in refugee camps across the border in Chad. The Zaghawa, one of the tribes identified in the UN report as victims, were Muslim. They formed part of the Sudan Liberation Army.[85] The Zaghawa emerged as the dominant power in the Shangal Tobay community in north central Darfur. The mainly non-Arab population, much of which had already been displaced by Arab Janjaweed attacks, initially welcomed them. They soon became victims of violence committed by the Zaghawa.[86]

After the SLA signed a peace agreement in 2006, it eventually split into four factions.[87] Two other rebel groups, the Justice and Equality Movement and the Liberty and Justice Movement, had refused to participate in the negotiation. The "new" war in eastern Darfur, which erupted in late 2010 and early 2011, pitted government-sponsored non-Arab groups against other non-Arabs, as well as the Zaghawa. By this date, the technical issues of definition had been superseded by the imperative of "do something" generated by media attention. Events in Darfur had officially become "genocide," whether they met the technical definition or not.

The Politics of Assistance

When the situation rose to the level of international concern, the United States did not wish to pressure the government in Khartoum for two reasons. The U.S. intelligence community felt that after the 9/11 attack on the World Trade Center in New York City, the Sudanese government had supplied good intelligence on al Qaeda. The government had also seemed more amenable in dealing with negotiations over the secessionist claims of South Sudan. On the other hand, the Bush administration faced mounting pressure to do something about Darfur from groups that formed important segments of its electoral base. Prunier characterized the resulting American policy as one of attractive promises without any firm commitments being made.[88] The European Union, while authorizing humanitarian assistance, lacked the concerted agreement to do more. A British special envoy for Sudan said the obvious: "Humanitarian *intervention* in Darfur would be *very expensive,* fraught with difficulties and hard to set up in a hurry."[89]

Those providing humanitarian assistance worked under almost impossible conditions. They were in the middle of the crisis with no protection, very little in the way of authoritative guidance, and no assurance of help if the situation deteriorated further. Costs escalated. In a time frame when the UN had budgeted $3.5 billion for peacekeeping (2005), agencies had estimated that the humanitarian effort in Darfur alone (no peacekeepers) would cost $722 million. Preliminary estimates of monies needed to guarantee any settlement with the south ran to another $246 million. This did not take into account other tasks, such as dealing with refugees. In total, UN financing needed for humanitarian assistance in Sudan alone would approach $1.5 billion, a sum unlikely to be forthcoming in a single year because the greatest proportion would have to come through voluntary contributions.[90] A move from humanitarian aid to a development agenda would generate other problems because of the potential long-term commitment required. The government of Qatar, which brokered the Doha Peace Accord in 2011, needed to raise $7 billion as an *initial* sum to support the reconstruction effort.[91]

The Security Council Committee imposed an arms embargo with respect to Darfur in March 2004 (SC RES 1556). In the wake of a cease-fire agreement in April 2004, the government of Sudan agreed to permit deployment of a peacekeeping force sponsored by the African Union (AU). The force began with 150 as a cease-fire monitoring operation and eventually grew to 7,000. From the beginning, it suffered from a lack of funding and other problems. Susan Rice, who served as U.S. ambassador to the United Nations, noted: "The unfortunate truth is this: the African Union's best is not yet enough . . . [T]he AU force is critically undermanned and has an impossibly weak mandate, limited to monitoring rather than enforcing the nonexistent cease-fire and protecting only those people facing an imminent threat within the force's immediate vicinity."[92] Another observer added an important note: The AU is still a captive of the internal politics of member states. Due to a fear of negative reactions from key member states, the AU leadership has not effectively dealt with the government of Sudan.[93]

The government of Sudan opposed an effort to transfer responsibility to the United Nations by playing the *sovereignty* card. By May 2007, the African Union force had come close to collapse because of a lack of funding and supplies because donor states had not lived up to their commitments. Rwanda and Senegal warned that they would withdraw their forces if UN member nations did not live up to their commitments.[94] The Security Council authorized (SC RES 1764) a "hybrid" AU/UN force in July 2007. As of April 2012, the effort employed 28,000 individuals, making it the largest peacekeeping force ever assembled. Beginning in July 2012, the Security Council had mandated a staged reduction to approximately 23,000 by the end of 2013. This may not reduce the need for resources.

Amnesty International has focused on another problem: open violations of the arms embargo. Violators include two of the five permanent members of the UN Security Council that originally voted to put the embargo in place. A recent Amnesty International report based on findings by a UN panel of experts authorized by a 2005 Security Council resolution (SC RES 1592) states that

> the supply of various types of weapons, munitions and related equipment to Sudan in recent years, by the governments of Belarus, the People's Republic of China and the Russian Federation, have allowed the Sudanese authorities to use their army, paramilitary forces, and government-backed militias to carry out grave violations of international human rights and humanitarian law in Sudan. This ongoing flow of new arms to Darfur has sustained a brutal nine-year conflict which shows little sign of resolution.[95]

In its conclusion, the report notes that the Sudanese government has repeatedly violated the embargo with impunity.[96]

After settlement of the South Sudan negotiations in 2005, the Security Council referred the situation to the International Criminal Court (Resolution 1593, May 31, 2005). The decision had interesting consequences. The ICC, looking for its own validation as a newly minted international court, eventually issued indictments and arrest warrants for a number of individuals, including the currently serving president and defense minister of Sudan, that alleged acts of genocide as well as crimes against humanity.[97] Although no entity has the authority to enter Sudan to execute the arrests (the sovereignty issue), the indictments will, in theory, restrict the international travel of those indicted to states that are not members of the ICC regime. This depends on the political will of those states to act on their obligations. When Sudanese president Omar al-Bashir visited Kenya in August 2011, the government refused to execute an arrest warrant, although Kenya is a member of the ICC. Subsequently, in November 2011, a Kenyan judge did issue a warrant with the warning that President al-Bashir would face arrest if he again traveled to Kenya.[98]

Politics and Reality

The diplomatic dilemma associated with any negotiation with the Sudanese government has a number of implications. Any aid given by a government could be construed as support for the policies of that government. But perhaps more important is the reputation of the Khartoum government and perceptions of their priorities. As I noted several times before, rhetoric and reality do not necessarily coincide. *The Economist* summarized the problem:

> On paper the Sudanese government backs both the peace plan of 2011 and the upcoming conference in Qatar. In reality it is loath to cough up much money for either . . . [I]t is serious short of cash, especially since it lost most of its oil income after South Sudan seceded in 2011. It is hard to see how Darfur will suddenly become an economic priority for Mr. Bashir.[99]

The United Nations noted on its Darfur website (2013) that "the Sudanese government appears unwilling to address the human rights crisis in the region and has not taken the necessary steps to restrict the activities of the Janjaweed."[100]

Other issues continue as well. The conflict between government policies and minority rights, and disputes over territory and ethnic political dominance, continue because both Khartoum and local political leadership still seek advantage through playing one faction against another. Second, the Darfur situation does not exist in isolation. As it continues, it has expanded to link with conflicts in other parts of Sudan, as well as the ongoing clashes between Khartoum and South Sudan. Third, formal UN sanctions have not curtailed the flow of arms and other forms of military aid. A recent analysis concludes that "Treating the Darfur conflict in isolation from the rest of Sudan not only makes increasingly little political sense but also fatally undermines the UN sanctions regime, the major international instrument intended to mitigate the conflict."[101]

The fundamental problem comes from the treatment of Darfur in isolation from other conflicts in Sudan. The outside sanctions and concern, including the deployment of the peacekeeping force, have not altered the basic dynamic of the conflict but have just dampened it for the moment. The AU/UN troops are a temporary fix that offers a response, without a promise of resolution, because it does not address the root issues. The unchecked flow of arms into the country despite the sanction regime, the unwillingness to place effective sanctions on the Khartoum government, and the continued flow of humanitarian aid despite the obstacles and difficulties all work against settlement. The hardest fact to accept is that relief efforts to alleviate the problems caused by the conflict might prove counterproductive in terms of providing incentives that will move the government in Khartoum toward a long-term solution. Others bear the burden caused by their policies. The prognosis: "The most likely future scenario for Darfur is thus 'more of the same'. The GoS [Government of Sudan] will probably continue an inconclusive war of attrition against divided rebel groups, further drawing from and fueling Darfur's patchwork of intercommunal conflicts. The inevitable human consequence will be further displacement and suffering."[102] Not a happy forecast.

CHAPTER 3

Who Kills and Why?

> One hundred dead are a catastrophe; one million dead are nothing but a statistic.
>
> —Adolph Eichmann[1]

> Monsters exist, but they are too few in number to be truly dangerous. More dangerous are the common man, the functionaries ready to believe and to act without asking questions.
>
> —Primo Levi[2]

A BEGINNING NOTE ON PERSPECTIVE

Eichmann's cynical quote, one of many that address the same disturbing reality, captures a fundamental difficulty in dealing with genocide and mass atrocity, or for that matter, natural disasters that result in massive destruction and death. The quote embodies a simple fact of life. The enormous scale of horror and carnage implied by genocide or other large-scale loss of life goes considerably beyond the ability of individuals who are not directly involved to comprehend. Even if using a familiar setting to emphasize the magnitude, the example would not necessarily enhance our ability to fully grasp the scope of what had happened. The Holocaust in Germany killed a number approximately equal to the total combined populations of Alabama and Georgia in 1945. The comparison might bring the tragedy closer to home even if those reading it had no firm idea about the exact number of people who lived in those two states. But the numbers still remain abstract, lifeless statistics, not a reality to which people can relate. Six thousand, 60,000, or 6 million dead lie entirely outside the ability of most people to conceptualize. We can comprehend the numbers intellectually, and we might feel deep moral outrage, but we lack appropriate points of comparison. Most people have never had an experience that has involved multiple fatalities and serious injuries, even by accident, let alone several hundred or several thousand.

We can relate emotionally to the deaths caused by a single auto accident or a story of individual suffering because individual victims have names, faces, and identities as human beings. But, beyond a few, numbers become only abstract descriptive constructs devoid of the meaning and affective impact conveyed by portraits of individual victims. When we deal with large numbers, the personal human element becomes a casualty of quantity. Pictures and videos may enhance our ability to grasp physical devastation, but we still relate more to the individual stories associated with the event than to the extent of the devastation. Without separate and distinct faces, victims become nameless and faceless parts of an enormous, often ill-defined aggregate. Moreover, we have only a relatively limited capacity to assimilate the stories of individual victims because at some points the stories merge into one another.[3] One case yields information. Three cases give corroboration, 10 provide confirmation, and 100 constitute a data point for substantiation. At 100, or even some time before, individual cases tend to become individual "statistics," a faceless part of the aggregate. Distance from the events magnifies the effect. As Victor Hugo sadly noted at the advent of the 20th century, "If a man is killed in Paris, it is murder; if the throats of fifty thousand people are cut in the east, it is a question."[4] I have dubbed the phenomenon "the perceptual law of large numbers viewed at a distance."

Yet we need the numbers to describe accurately the scale of harm and injury. Numbers become an essential part of the currency of expression, perhaps because words alone, no matter how powerful or graphic or how fertile the imaginations of those reading them, seem incapable of conveying the extent of human suffering. Words alone fail to convey the scope and depth of evil associated with genocide because as noted above, most of our imaginations lack appropriate referents. Personal accounts of victims and observers, as well as pictures and videos, may help us in visualizing the horror of the events. The graphic scenes of bodies stacked mile after mile along roadsides in the video of General Roméo Dallaire's reflections on his experience in Rwanda (*Shake Hands with the Devil*)[5] do give a sense of the magnitude of that catastrophe. But, at some point, the pictures and accounts also begin to overwhelm the mind. The victims again become largely without individual identity as multiple accounts merge into one another. *This conclusion is not meant to diminish the importance or the impact of these accounts.* Prior observations address the psychological responses of individuals remote from the events, not those who had first-person experience with them. The same is true of pictures and videos. The impact of the few will spark concern, often deeply held, but still does not necessarily enhance the ability of "the many" to grasp the magnitude of the killing in its entirety, even if the nightly news broadcasts continuing stories. Horror at the first report fades to numbness by the 10th.

Nonetheless, at its simplest, genocide inevitably raises one central question: What leads ordinary individuals to commit and/or condone extraordinary acts of evil against their fellows? Christopher Browning has argued that, historically, most people have not been a party to genocide.[6] Even in societies where resort to violence was an everyday fact of life, mass atrocity was a relatively rare occurrence. But he also notes that this observation has a downside in that it lends support to the idea that genocide results from aberrant behavior. Acceptance of this conclusion reinforces a search for particularities that could trigger or support such behavior. Such a search might give us comfort because the occurrences do lie considerably outside the experience of most people. This makes it difficult to find reasonable explanations without resorting to assumptions of abnormality. Browning himself certainly does not share the notion of genocide as aberration. The title of his seminal book about Germany and the Holocaust, *Ordinary Men*, clearly states his own viewpoint.[7]

Many observers have struggled with questions of motivation and reasons. Certainly, the proposition that "people like me" could not have willingly taken any part in mass atrocity gives comfort. Unfortunately, the evidence unerringly supports the conclusion that genocide requires the participation of a great many ordinary people. Some consensus does exist about possible root causes, although the relative weight of any factor when discussing particular cases is still an issue. What we do know presents a disturbing picture. The focus here is not on serial killers or individual psychopaths who go on killing rampages in public places. We *can* explain these instances as the aberrant behavior of a very few individuals. Still, the principal concern in this chapter is on the deliberate, systematic, and sustained harm inflicted on defenseless groups that have been targeted for political, social, and/or religious motives.

James Waller points out a simple truth: "Ultimately, genocide and mass killing happen only because individual human beings kill other human beings in large numbers and over an extended period of time."[8] The 20th century has received the sobriquet "Age of Genocide" because estimates place the number of victims at upward of 60 *million* men, women, and children.[9] Genocide does not happen from mobs taking spontaneous action. The incitement of a moment might produce a lynching, but genocide requires a sustained effort over time. That does not happen without planning and the involvement of a relatively large number of individuals. The central question is, what motivates people to participate in such carnage?

Hannah Arendt and Thomas Merton have eloquently commented on the ordinary behaviors—in Arendt's oft-quoted words, "the banality of evil"—required to sustain the activities that define genocide and mass murder.[10] Merton's concise description of Adolph Eichmann as a good citizen pursuing a quite ordinary routine, but one that supported extraordinary acts of evil, gives us a chilling picture. Merton wrote:

> If all the Nazis had been psychotics, as some of their leaders probably were, their appalling cruelty would have been in some sense easier to understand. It is much worse to consider this calm, "well-balanced," unperturbed official conscientiously going about his desk work, his administrative job which happened to be the supervision of mass murder. He was thoughtful, orderly, unimaginative. He had a profound respect for system, for law and order. He was obedient, loyal, a faithful officer of a great state. He served his government very well . . . It all comes under the heading of duty, self-sacrifice, and obedience. Eichmann was devoted to duty and proud of his job.[11]

Merton argues that, apart from the purpose of the tasks performed, Eichmann exhibited virtues that we normally honor: loyalty, duty, and conscientious performance in his job. Nonetheless, if we accept that events such as the Holocaust do not result from extraordinary circumstances, but at base involve acts of ordinary men and women, how can we account for what we perceive as extreme deviation from normal?

Are there common cultural, ideological, or psychological traits that dispose societies and individuals within those societies to engage in, and willingly support, such extreme behavior? Moreover, the most disturbing cases do not involve those who commit a few violent acts; the planners and instigators may have never physically killed anyone. Hitler and most of his closest advisers, and Pol Pot and the coterie surrounding him in Cambodia, come to mind. But the planners and instigators had to rely on the actions of many others in order to implement their designs. How do we explain the bureaucrats who routinely carried out their assigned duties as if they formed everyday, ordinary tasks? How can we explain those individuals who turn on coworkers or neighbors after years of working amicably together? Dr. Susan Allen of Emory University, who had to flee from her AIDS clinic in Rwanda in 1994, fearing for her own life at the time (and afterward from *génocidaires* living outside Rwanda who knew that she had knowledge of their participation), was appalled to find on a return visit that a Hutu employee she knew well had willingly participated in the deaths of Tutsi coworkers.[12]

In his study of Reserve Police Battalion 101, which participated in the mass killings in Poland from the summer of 1942 through the summer of 1943, Browning describes the composition of the unit:

> The men . . . were from the lower orders of German society . . . By virtue of their age, of course, all went through their formative period in the pre-Nazi era. These were men who had known political standards and moral norms other than those of the Nazis . . . [T]he majority came from a social class that had been anti-Nazi in its political culture. These men would not seem to have been a very promising group from which to recruit mass murderers on behalf of the Nazi vision of a racial utopia free of Jews.[13]

Yet, Browning estimates that this battalion of *500* ordinary men participated in the direct killing of at least 38,000 Jews and the deportation of 45,000 others to the extermination camp at Treblinka.[14]

We seek simple answers, but unfortunately answers here do not necessarily rest upon simple explanations. Answers require examining the many influences that might have an impact on human behavior in particular situations. The answers require that we examine individual psychological makeups as well as the impact of group dynamics on behavior. The discussion will also focus on macro-level political-historical factors that can provide insight into the origins of particular instances in some detail in the individual case studies. *Note here that seeking to provide explanations for behaviors does not constitute an attempt to justify them.* Waller cautions: "We must continually remind ourselves that a psychological explanation of extraordinary human evil is not exculpatory . . . To understand all is not to forgive all."[15]

ON KILLING: FOCUS ON THE INDIVIDUAL

David Grossman, in the introduction to his book *On Killing*, asserts a proposition that seemingly supports the idea of genocide as deviant behavior. He advances what he characterizes as a "novel and reassuring conclusion" about the nature of man, that "despite an unbroken tradition of violence and war, man is not by nature a killer."[16] Grossman, a retired army officer, reached this conclusion based on his own extensive investigations into the behavior of soldiers in battle, as well as evidence from researchers pursuing similar lines of inquiry. Grossman maintains that "the media's depiction of violence tries to tell us that men can easily throw off the moral inhibitions of a lifetime—and whatever other instinctive restraints exist—and kill casually and guiltlessly in combat. The men who have killed, and who will talk about it, tell a different tale."[17] William Manchester wrote about his experience in World War II:

> You think about it and you know you're going to have to kill but you don't understand the implications of that, because in the society in which you've lived murder is the most heinous of crimes . . . and you are in a situation in which it's turned the other way round . . . When you kill someone the experience, my experience, was one of revulsion and disgust.[18]

Manchester records that after his first incident of killing an enemy soldier in close quarters, he then vomited.[19]

Studies have claimed that a large proportion of infantry soldiers (as many as 65–75 percent) in World War II never fired their weapons at an enemy soldier.[20] Additionally, many of those who had killed, especially those who had done so in hand-to-hand encounters where the enemy's face was recognizable, often suffered severe psychological trauma. Grossman notes that the reluctance to fire has even occurred under circumstances where, if soldiers do not kill, they and perhaps their comrades will die. His simple conclusion—most individuals are reluctant to kill when the potential victim is an identifiable human being.

Grossman's contention runs counter to what most of us believe. From the standpoint of observers far removed in terms of experience, this finding does not gibe with our intuitive expectations about behavior in a life-threatening environment. After all, we believe that we will, as an automatic response, protect ourselves and our own. Moreover, is not the point of basic training to transform ordinary men and women into soldiers? While those who have not served may understand the importance of instilling discipline, I suspect that few (unless you have gone through army or marine corps basic training) think about the importance of developing the necessary mind-set that will make ordinary men and women willing to kill. S. L. A. Marshal, whose research underpins much of the literature on combat effectiveness, has argued that training for World War II did not prepare individuals to kill. In 1947, after analyzing his extensive interviews done during WWII, Marshal wrote: "We are reluctant to admit that essentially war is the business of killing."[21]

Both Marshal's methodology and his findings have been questioned.[22] Still, support for his general thesis comes from officers respected for their battle experience. General George Patton wrote that perhaps the great weakness of his troops was their reluctance to fire.[23] General Lucian Truscott, commander of the U.S. Third Division observed:

> I was surprised to find what a relatively small proportion of individual weapons available in any unit were ever employed in action. One would think that every unit engaged in combat would employ every possible weapon, for battles are won by destroying or threatening to destroy the enemy. But this had not been so in the actions in which our infantry and armored battalions had been engaged.[24]

Anthony King, in his recent study, argues that "in the Second World War as in Vietnam, poorly trained infantry were disoriented by combat . . . so that they were unable to execute their roles effectively."[25] King notes that these observations also applied to soldiers in other *conscript* armies.[26]

If the military has had difficulty in overcoming the inhibitions of those recruited to protect themselves and their country in what they perceive as a good cause, what could possibly motivate civilians to participate in killing their neighbors in large numbers? If most individuals cannot bring themselves to kill in combat when they can identify the opponent as a human being, even though they have had training, what could conceivably provide the incentives for the individual actions that result in the large-scale massacre of civilians?

But Grossman's research about the nature of "killing" is considerably more nuanced than these quotes suggest. The services have not ignored these findings. The question is, what changed and to what effect? Recruitment changed from conscript to professional/volunteer—from a mass-based universal service concept to a self-selected group of professional soldiers. Grossman also argues that a new era has quietly dawned in modern warfare: "Psychological warfare conducted not upon the enemy, but upon one's own troops . . . With the *proper conditioning and the proper circumstances, it appears that almost anyone can and will kill.*"[27] He does note that the change with respect to the military has not come without consequences. The number of soldiers suffering from post-traumatic stress has risen dramatically. If soldiers now are more willing to kill the enemy, the change comes with a price—they still do not kill without guilt.[28]

Table 3.1 lists a number of factors that can, in specific circumstances, override individual inhibitions about killing or inflicting harm. The factors obviously have considerable overlap in terms of explanation. No single influence accounts for all behaviors.

These factors, though derived from battlefield observations, also provide a basis for exploring the social psychological and psychological

Table 3.1

What Motivates Soldiers (and Others) to Kill

Psychological Conditioning
- dehumanization of targets
- respect for authority
- conditioned responses to situations
- focus on task–machine gunners and "crew operated" weapons

Leadership/Authority
- proximity
- subjective respect for leaders
- intensity of demand(s)
- legitimacy

The Group: Accountability to Fellows
- bonding
- "mutual surveillance" phenomena

Physical and Emotional Distance from "Targets"
- bomber pilots and crew
- missile launch officers
- artillery crews

Source: drawn from Grossman, *On Killing, passim*.

influences that can turn ordinary people, willing or not, into perpetrators and accomplices in genocide and mass killing.

PERSONALITY, HUMAN NATURE, SOCIALIZATION, AND BEHAVIOR

Keep in mind that Marshal argued that *part* of the explanation for the reluctance of infantrymen to fire stemmed from their socialization into the fundamental morality of *Western* culture, which places great value on human life.[29] Even so, Western societies do not have an exemplary record in terms of benign treatment of those considered less "civilized." Primarily, the following explores two basic but interrelated categories that affect individual behavior. The two categories involve factors that affect individuals in very different ways. The first category entails factors that generate the fundamental values and attitudes that shape how individuals perceive and deal with "their" world—the process of *socialization*. The second category involves factors that influence individual decisions in specific circumstances. Table 3.1 lists factors that fall primarily into the second category.

Nature versus Nurture

Philosophers, social scientists, and others have long debated the issue of whether humans are aggressive by nature and have innate tendencies that promote self-gratification and survival over other values or whether the circumstances of the social environment have the most important influence in forming how we interact with the world. Are certain psychological characteristics, such as behavioral tendencies, personality attributes, and mental abilities, "wired in" by genetic inheritance or is the mind at birth a blank slate that evolves as children interact and experience the environment around them? Why do some people seek and accept risk, and why do others buy insurance and seek safe positions? What accounts for "natural" soldiers? The questions relating to the relative influence of genetic makeup as opposed to environmental factors have become known as the "nature versus nurture" debate.[30]

Freud, for example, believed human beings have an innate aggressive/destructive drive (thanatos) that "functions in every living being, striving to work its ruin and reduce life to its primal state of inert matter."[31] Civilization is possible only when reason and circumstance result "in the progressive rejection of instinctive ends and a scaling down of instinctive reactions."[32] From the opposite perspective, Albert Bandura argued that environment comprises the most important factor.[33] Children learn by observing and imitating the behavior of people in the world around them. They learn "appropriate" behaviors by observing responses to the actions of others as well as through feedback in the form of reinforcement or punishment for their own actions. They also learn how to justify their actions.

The purpose of this book does not demand an exploration of the issues raised by this debate in any detail. No reputable writer argues that human nature is entirely to blame for any of the horrendous events in the age of genocide, but people often seek simple answers. Note that even Freud, who believed that human beings had a fundamental aggressive drive, offered a nuanced answer to Einstein in arguing that reason and circumstance could control the basic urges. For our purposes, these traits play a mediating role in determining the extent to which individuals absorb and act on the standards and beliefs inculcated through socialization, but they do not offer a complete explanation. Ervin Staub summarizes:

> Our knowledge of personality dispositions and their childhood origins is not specific enough to identify the sources of different types of aggressive behavior . . . Circumstances may join with common rudimentary dispositions to shape specific types of hostility and aggression.[34]

This chapter will explore the factors that can motivate individuals to participate. Even though only a few plan, instigate, and initiate the process, genocide requires the involvement of a large number in addition to the few planners and instigators.

Socialization and Culture

Individual world views result from a process of *socialization*, which shapes the way in which individuals interact with their world. Socialization results from a blend of cultural and institutional factors that include family, peer groups, religious beliefs, ethnicity, school curricula, class, and nationality. Obviously these do not represent self-contained categories. Ethnicity and family (or lack thereof) will influence factors such as peer-group associations and religious beliefs during an individual's formative years. The relative importance of these factors will vary by culture. For example, while peer groups have great importance in the United States, in other parts of the world they have considerably less influence than adult family members or other adult authority figures.

Culture provides shared explanations and images of the world. *Culture will shape essential attitudes toward the legitimate use of violence*, accepted behaviors toward group members, perceptions of persons not belonging to the core group, and appropriate behaviors when dealing with "foreigners."[35] Note that ethnicity, religion, race, and nation are all social constructs that depend on how each distinctive community defines them. In this sense, the process of socialization determines the attitudes toward each of these. Socialization of the young creates individuals whose personal values and conduct will permit them to function effectively in their immediate social environment. How congruent those values are with expectations in a broader social context, such as a dominant national culture, can determine one's status within the broader society and one's attitude toward "foreigners" or other social groups. Different cultures can either mitigate or exacerbate negative attitudes toward those considered outsiders.

The general belief that African Americans were of a lower order, at best second-class human beings, had great currency across the United States during the era of segregation (and not just in the Southern states). Although more publicized when they happened in the South, acts of overt violence against African Americans more often than not were simply ignored and glossed over. This provides an instructive lesson. Cultural norms might predispose members toward mistreatment of others. Staub argues that "the moral orientation of a society sets limits on acceptable conduct and influences the choice of avenues to cope with difficult life conditions."[36] Devaluation (desensitization), a denial of equal humanity, makes mistreatment more likely. Just defining people as "them"—that is, not part of "us"—devalues their standing and worth. Staub asserts that otherwise unacceptable acts become acceptable when directed at "them" because by definition "they" do not have a place in the moral universe that defines "us."[37]

Sparta provides us with a good example of socialization in terms of the legitimate uses of violence and attitudes toward those outside the core group. Modern Western societies owe much to the Spartans. Sparta stands as the epitome of important civic virtues: self-sacrifice for the public good, achievement against overwhelming odds, and community service. Spartan soldiers defined the ultimate in discipline, courage, and skill.[38] One doubts that Spartan soldiers had any qualms about or adverse aftereffects from killing an enemy in battle. For lack of a better description, they were focused, trained killers. Their training emphasized mental conditioning that involved *desensitization* toward slaves and "outsiders." The institutions of Spartan society depended on the work of enslaved Messenians known as helots. At the culmination of the *agōgē*,[39] the education cycle that prepared boys to become warriors, those who had excelled in training were invited to participate in the *krupteía*. This exercise gave them license to kill any helot they encountered at night.[40] Troublesome helots could be summarily executed. This had the dual purpose of controlling the enslaved population and quelling any inhibitions about killing "enemies." Only Spartans who had served in the *krupteía* as young men could expect to achieve the highest ranks in Spartan society. Societal norms prescribed that only those who had demonstrated the ability and willingness to kill for the state at a young age were worthy to join the leadership in later years.

The suppression of the Messenians put the Spartans outside of mainstream Greek culture because it violated a fundamental norm shared among other Greek city-states. The issue was not slavery but identity. One could enslave non-Greeks but not fellow Greeks. Unlike the Romans, who came to value their Greek slaves, the Spartans regarded the Messenians as a necessary, but totally replaceable, resource to be used or discarded at will. In this sense, they had no more value than candles or oil lamps. For most purposes, any one would do. Like candles or lamps, some were more decorative or useful than others, but they were still disposable at will.

Sparta illustrates that societies inculcate attitudes and values considered essential to the identity of the group. Prized values do not necessarily apply to individuals outside of the core group and can be used as justification to subjugate others. Consider that Athens was built on the ideas of individual dignity and participatory democracy, yet these principles applied only to male citizens, a very small minority of the total population. Athenian citizens owned slaves, and interestingly, Sparta, not Athens, is the poster child for women's rights in the ancient world. Unlike the sequestered life led by most women in the ancient world, Athens included, Spartan women engaged in physical training, could own and inherit property, could divorce, and had equal citizenship rights.[41]

The Relevance of Cultural Models

Societies teach and promote values that contribute to personal independence, choice, and the pursuit of private fulfillment. Collectivistic cultures focus attention on the group with emphasis on conformity, tradition, safety, and order.[42] The characteristics of group membership, whether based on race, ethnicity, kin, religion, or nationality, will shape the nature of individual identity. When group membership is seen as relatively impermeable and fixed, the potential to promote internal goals based on loyalty and to view other *groups* as threats will be high.[43] Hence, group values can enable killing and atrocity if a close bond exists between members with a shared goal.

From another perspective, peer pressure, in which the individual cares about what others think about him or her, can push people to commit acts that they would not otherwise do. Grossman states that the influence of groups "occurs through a strange and powerful interaction of accountability and anonymity."[44] Demands for loyalty and obedience transfer responsibility for conduct from each individual to the collective whole while reinforcing the sense of shared purpose. This process suppresses individual conscience and responsibility. Group participation diffuses responsibility for actions, however heinous, because of shared participation. Internal rules, formal or informal, govern expected behavior and override all other codes of conduct. Members feel accountable to their fellows but not necessarily for what the group does. Anxiety about the response of others if one does not do well also plays a part. Social psychologists term this phenomenon "mutual surveillance."

For example, hazing has long been a problem connected with college fraternities and sororities as well as other groups that have rites of passage to gain membership. Street gangs such as the Crips and Bloods, organized crime organizations such as the Japanese Yakuza, or terror groups like the Ku Klux Klan all operate on the same basic pattern. Military training seeks to build such a bond. Individuals slay together and play together. Prior to World War II, the Japanese Army succeeded in inculcating such an ethos in its soldiers which involved a prime directive that a soldier loyal to Japan never surrendered because one owed one's life to the Emperor. Reminiscent of Sparta, while occupying Manchuria, the Japanese Army used live Chinese men for bayonet practice. After the war, almost to a man, captured Japanese denied any personal responsibility for atrocities committed because they did so under orders from the chain of command headed by the Emperor.[45] A participant in the Rwanda genocide said: "If you proved too green with the machete, you could find yourself deprived of rewards, to nudge you in the right direction. If you got laughed at one day, you did not take long to shape up."[46] The closer the bond between members, the more powerful the internal group ethos will be on individual behavior.

Classifying the "Other": Ethnicity, Race, and Nation

The prior discussion of race, nation, and ethnicity dealt only briefly with some important issues. Most importantly, the contemporary ideas associated with the definitions of these three categories were developed over the past 300 years. This statement does *not* mean that ethnicity in the sense of defining the "other" did not play a role in the world before modern Europe emerged on the stage. It simply states that the modern meaning has dimensions that older usages did not imply. Eric Weitz argues that *modern* conceptions and understandings of "race" and "nation" date only from the 18th century, when Europeans struggled with sorting out a world of unexpected diversity discovered during the previous three centuries of travel and conquest.[47]

Xenophobia, the fear of outsiders, is not an uncommon attitude in the contemporary world. In the ancient world, visitors from outside the group often had to submit to a ritual purification process to ensure that they had not brought harmful spirits with them.[48] While in the modern era the question does not involve harmful spirits, many ethnic groups have deep-seated suspicions about those not part of their culture. A recent report from China on attacks on foreigners noted that the "question of how the Chinese view outsiders remains vexed."[49] Even though America has claimed the designation of "the melting pot," immigrant groups have been tagged with unflattering labels. Australia at one time maintained a "whites only" immigration policy.[50] A recent study asserted that "a vast body of international research shows that the media portrays immigration and immigrants in a negative light."[51] The authors note that,

> in covering immigration issues, the media consciously and unconsciously make racialized statements about "who belongs" in the nation and who does not. While these discursive connections serve to bolster the belonging of the "us" group, they have the opposite effect for the "them" group who get defined as immigrants. This distinction is a key process in the creation of a national self-image for the majority group.[52]

The negative perception in the United States and Western Europe toward the large number of Muslim refugees fleeing from conflict in the Middle East gives us a striking contemporary example. Kris Kristofferson offers a more earthy explanation: "Most of us hate anything that we don't understand."[53] The Brexit vote in the United Kingdom, the rising poll numbers for Marie Le Pen and the National Front in France, and the successful quest of Donald Trump to become the Republican Party candidate for the 2016 Presidential election in the United States by highlighting the immigrant issue illustrate these points. Although the English vote for Brexit turned on the free flow of immigrants from Eastern Europe, not the Middle East, the mantra still reflected the common theme—their presence affects and challenges our way of life in ways we find unacceptable.

Definitions of ethnic groups often include a territorial component, but the essential elements depend on factors that shape a shared way of life. Members of an ethnic group generally share a belief in how their common heritage originated, often enshrined in shared stories that recount momentous events that explain the importance of rules, rituals, symbols, and other factors that define the essential character and identity of the group.[54] This may include language, religion, types of appropriate dress, and specific forms of art and music. Ethnic groups vary in their attitude toward outsiders who desire to assimilate. Some are relatively open, particularly through marriage; others are relatively restrictive. For our purposes, another question becomes the focus in the modern world—the relationships among and between various ethnic groups. Groups have little control over the way others characterize them. Given the primary political organization of the contemporary world into sovereign states, this forms a critical concern. Table 3.2 discusses how movies and TV can form positive or negative impressions of other cultures.

Weitz contends that an ethnic group evolves into a nation when it seeks to create, or have created for them, a political order supportive of their identity.[55] In an oft-quoted book, Benedict Anderson describes nations as imagined communities that reflect a shared state of mind.[56] As with many social constructs, individual beliefs about what makes a particular nation do not necessarily have to rest upon solid historical roots, nor reference any concrete factual basis. It merely requires a unifying message often

Table 3.2

A Note on Race and Ethnicity

Many times we do not realize the ways in which our ideas about "others" develop and become reinforced. Have you ever stopped to think about how mainstream films and television programs present other races and cultures? Film and other media consciously use certain stereotypes that define "who belongs" in the sense of national self-image. Tom Englehardt in his essay, "Ambush at Kamikaze Pass," analyzes the way motion pictures and television programs have portrayed various ethnic groups over the years. As a matter of course, to maximize audiences and minimize criticism, the scripts have to adhere to stereotypes that audiences accept. These are not "propaganda" films as we understand the word. However, the plot devices reinforce certain stereotypes for everyone, including the young, who are the most impressionable. In particular, Englehardt discusses the nonwhite annihilation scenario which plays as "barbarians" versus "civilization" as represented by settlers or others:

> . . . the ambush scenario flipped history on its head, making the intruder exchange places with the intruded upon . . . Naturally, the viewer identified with those inside whom the movie certified as human . . . Little wonder that [the viewer] had no feelings for a treacherous and aggressive enemy who fell before . . . withering fire.*

* Tom Englehardt, "Ambush at Kamikaze Pass," in Englehardt, *The End of Victory Culture: Cold War America and the Disillusioning of a Generation* (Amherst: University of Massachusetts Press, 1995), 37–53.

based on a set of iconic symbols associated with a set of teachings that resonate among a particular group of people.

The myth of the nation as a distinctive community rests upon the general ideal that the association among members involves a very deep shared horizontal comradeship.[57] No one definitive set of criteria encompasses the many communities described as nations in the contemporary world, but many years ago I ran across a French epigram that briefly defined a nation as a "group of people bound together by a belief in a common error about their ancestry and an uncommon dislike of their neighbors." This captures perfectly the essence of the negative aspects of nationalism.

Ernest Gellner has argued that "nationalism," the feeling of pride in one's own heritage, "invents nations where they do not exist."[58] After the horrors of World War I, Sigmund Freud described nationalism as "the narcissism of minor difference."[59] In the contemporary world, nationalism, combined with a desire to have the political authority to chart one's own course without interference from others, has led to groups demanding the right of self-determination, which translates into a demand to have their own sovereign nation-state.

Textbooks in international relations routinely refer to the nation-state as the fundamental unit of organization in the world, even while acknowledging that the term describes an ideal, not the reality of contemporary international politics. Very few sovereign states contain only one nation within their boundaries. Hence the difference between the idea and the reality stands at the root of much contemporary violence. Groups, whether termed ethnic or national, seeing themselves subject to and oppressed by others, have sought self-governance. This has produced a number of uprisings. The breakup of Yugoslavia and the former Soviet Union in the early 1990s generated a number of secessionist movements that eventually produced several new, separate sovereign states. At this writing, some of the newly minted states that emerged at the end of the Cold War now face demands for additional partition: Pridnestrovie (Moldova), Abkhazia and South Ossetia (Georgia), and Nagorno-Karabakh (Azerbaijan) have made claims to independence. Relations between Macedonians and Albanians continue to generate tensions in the former Yugoslav republic of Macedonia. The Chechen rebellion continues as a problem for the Russian Republic.

Going back to the question of immigration, in a sovereign nation-state the definitions of nationality and citizenship become important issues when linked with immigration. As with acceptance into an ethnic group/nation, criteria for citizenship might be very narrowly defined or relatively open. Many times nationality and citizenship laws were designed with the explicit intent of making sure that certain groups could never attain full political rights.

Prior to the year 2000, when new legislation took effect, Germany had one of the strictest nationality laws in Europe. It used "Teutonic ancestry" as its operative test. As a result, the law effectively barred some 7 million permanent resident Turkish workers and their children from gaining German nationality/citizenship.[60] After regaining their independent status in 1991, Estonia enacted a law that limited citizenship/nationality to individuals who had resided in pre-World War II Estonia and their descendants.[61] This effectively barred large numbers of resident ethnic Russians (25 percent of the population), who had emigrated after the incorporation of Estonia into the Soviet Union during World War II, from claiming citizenship/Estonian nationality.

Race as a Factor[62]

First, note that in present day, the scientific debate over the extent to which genetic attributes sufficiently differentiate individuals into identifiable racial groups remains extremely contentious. Race remains the most exclusive form of identity in the contemporary world. Nonetheless, race does not have long historical roots as a classifying concept. As used in contemporary discourse, the ideas evolved out of European contact and experience with other parts of the world during the period of exploration and colonial conquest (beginning in the 15th century). Prior to that, language, religion, status, and class distinctions had more importance than physical appearance. Unlike culture, the elements that define race are "indelible, immutable, and unchangeable."[63] While skin color provides the most obvious distinction, Étienne Balibar argues that "race," as used by many authors, often goes beyond simple appearance to ascribe certain inborn behavioral traits as well.[64] Most racial categorizations come from individuals outside a group who have reasons to set the members of the group apart.

As the concept evolved, unlike ethnicity, the assignment of race implied a hierarchy. This flowed from accepted divisions in European society, a belief in the superiority of European accomplishment and culture, and a movement toward "naturalism" and empiricism (observation) as a mode of verification by 17th- and 18th-century philosophers. Although empiricism underlies the philosophy of modern scientific method, in this instance, "science" and scientific method as it evolved served to validate rather than repudiate earlier ideas about racial difference. Over the next 150 years, various "scientific" theories purported to validate existing ideas about a natural hierarchy of racial groups. The empirical perceptions of difference were often based on the most cursory evidence.

Carolus Linnaeus, who developed the foundations of modern biological classification, also applied his methods to humans, but his conclusions did not come from personal observations. In the 10th edition of *Systemae Naturae*, published in 1758, Linnaeus proposed four subcategories of the human species: Americanus, Asiaticus, Africanus, and Europeanus.[65] To each of these he attributed certain characteristics. Africans were "lazy," Europeans "ingenious" and "industrious," and Asians "melancholy."

In the next century, the work of Charles Darwin ("natural selection") and Herbert Spencer ("survival of the fittest"), among others, provided the basis to develop theories that not only justified the hierarchy but policies and practices based on it. Weitz provides a concise analysis of how congruent science and society seemed to be for those who embraced what came to be termed "social Darwinism." The struggle among races for scarce resources seemed a perfect analog to the struggle among species for survival. The correspondence between the natural and social worlds seemingly now had a firm scientific basis. If various species evolved strengths that aided survival through competition, so would human societies. During the latter part of the 19th century, the advances in biological and medical knowledge also generated the idea that the entire human race could be progressively evolved through selective breeding for desirable characteristics. Francis Galton, a cousin of Darwin, coined the term "eugenics," which became the basis for a serious social movement devoted to promoting policies that would literally "weed out" the weak, sick, dim-witted, or *those others who might cause racial degeneration*.[66]

The term "eugenics" has largely disappeared from modern discourse because of its association with policies in Nazi Germany, but many countries, the United States included, had instituted policies of selective sterilization or other procedures that had the goal of preventing procreation. Note that Nazi policies also targeted those individuals considered mentally ill or handicapped. It did not just apply to Jews. The eugenics movement nurtured the idea of society as a patient that needed treatment by competent physicians. Government ministers, as well as socialist reformers, thought of society as analogous to the body and race as a biological organism whose health needed constant attention to protect it from the potential degenerative impact of the infirmities of weaker members and by those from completely alien races. This theme would play a major part in the ideology of Nazi Germany. The Nazis saw links between Jews and "negroes" everywhere: "In their view, Afro-Germans, like Jews, had a 'hybrid character,' one which led to a host of 'racial maladies,' as well as mental defects . . . Hitler . . . not only saw Jews everywhere, he also saw Negroes everywhere."[67] If society has an illness, then the cure will require a radical solution to restore the health of the group, but equally important, prevent future "illness." One key clearly lay with the necessity of mobilizing people to help with the removal of the source of the illness, to "clean up," so to speak, to prevent further spread and possible recurrence and thus make all stronger.

Minorities and Discrimination

Minorities, however defined, have often faced overt discrimination in many parts of the world. The issue so concerned the framers of the Versailles Treaty ending World War I that newly created states sign international treaties guaranteeing fair treatment of minorities within their borders.[68] But, in dismantling the Austrian and Turkish empires, the settlement also overtly ratified the right of self determination—the idea that each nation, however defined, had the right to form its own state. One problem derived from the difficulty of turning the ideal into reality. Not all of those groups who saw themselves as distinct "nationalities" could be accommodated.

The connection between ethnicity/race and nationality heightened tensions as well. Self-defined "nations" still within a state controlled by another "nation" often found themselves the targets of discriminatory policies. The newly formed Permanent Court of International Justice found itself dealing with many cases concerning questions of minority rights and treatment under the various conventions established to prevent discrimination. Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between States, and delivered 27 advisory opinions.[69] One third of the advisory opinions concerned the treatment of minorities.

Equally, the new emphasis on nationality had an impact on the status of Jews, particularly in the newly created states, because, as Weitz argues, "they were the consummate outsiders wherever the nationalities principle was affirmed."[70] Jews occupied prominent positions in almost every sphere of mainstream German life. Hugo Preuss, a Jew, drafted the Weimar Constitution.[71] The problem stemmed from the perception of the extent of assimilation by influential segments of Germany society. The Jewish community sought to preserve (and observe) the essential elements that defined their identity, the values important to "being Jewish," albeit adapted to the modern age, while also playing active roles as good citizens and contributors to the larger society.[72] But, the preservation of Jewish distinctiveness, combined with the seemingly successful participation of Jews in a secular, non-Jewish society, still marked them as not wholly "German." The prominence of Jews in political, intellectual, and cultural life served to highlight differences and engender resentment, particularly from many right-wing groups.[73] Weitz argues that widely held assumptions about race made assimilation a problem because "Jewishness" was seen as "in the blood," hence always a threat, perhaps even more subversive than before.[74]

Jews in many different countries, African Americans and native Americans in the United States, indigenous populations in other places conquered as colonies, as well as many designated enemies of the state for ideological or other reasons, have suffered exclusion from the domain of dominant moral orientations or the informal norms that define polite society. Many target groups share an important characteristic. They constitute "ethnic groups and/or social classes that have traditionally been difficult to integrate or assimilate into the larger society, or have been refused assimilation."[75] The estimated 10 to 12 million Roma, often called "gypsies," in Europe (6 million in the European Union)

> have suffered centuries of discrimination and persecution. But Europe's turbulent economic climate has contributed to a rise in populist anti-Roma rhetoric as some authorities seek scapegoats on which to pin the blame for widespread public discontent. The openly anti-Roma agenda of some far-right parties in Europe—such as Hungary's Jobbik, the Czech Republic's Workers' Party of Social Justice and Bulgaria's Ataka—can also be seen in mainstream policy . . . But anti-Roma bias is not limited to Eastern and Central Europe. Roma people in both France and Italy have faced strong popular hostility in recent years, intensified by anti-Roma laws and deportations.[76]

In the minds of some, these attitudes encourage and justify engaging in sporadic acts of violence, but demeaning attitudes and systematic mistreatment of a group do not mean that genocide and mass atrocity lie somewhere in the future. The discussion above of the status of the Roma in Europe should not be taken as a suggestion that they are necessarily at risk in any country but rather as a contemporary illustration of how socialization impacts attitudes. The widespread anti-Roma sentiment, which is found to some degree in countries across both Eastern and Western Europe, certainly runs counter to espoused liberal EU values. Nonetheless, one hears very few cries about human rights violations. The gap between human rights rhetoric in Europe and the reality on the ground testifies to the power of populist right-wing politics in times of economic instability. It also unfortunately exemplifies a general openness toward adopting xenophobic stereotypes and policies that can affect the lives of millions of people.

From Discrimination to Genocide and Mass Atrocity

To this point the discussion has emphasized socialization as providing a precondition that develops a common set of widely shared societal attitudes toward a target group. Negative attitudes can be instilled and reinforced through many different influences. Remember Freud's observation about the "narcissism of minor differences." Simply, what from the outside seems a minor distinction can have major importance from within. In Rwanda, Peter Uvin observes that a psychological attitude of exclusion and resentment formed an essential part of everyday Hutu life, reinforced by proverbs, myths, and folklore that demonized the Tutsis.[77] A participant said, "A Hutu could certainly choose a Tutsi friend, hang out and drink with him, but he could never trust him. For a Hutu, a Tutsi might always be a deceiver."[78]

Yet, in the first cases heard by the International Criminal Tribunal for Rwanda, judges had great difficulty in characterizing actions as genocide because they could not find any ethnic, language, religious, or racial distinctions that would separate Hutu from Tutsi (interestingly, this included dominant physical characteristics). Based on testimony of experts, the court first concluded that class, not ethnicity, formed the critical element:

> It is recognized that prior to the colonization of Rwanda by Germany, and later Belgium, the line separating the Hutus and Tutsis was permeable as the distinction was class based. In other words if a Hutu could acquire sufficient wealth he could become a Tutsi.[79]

Note that the legal definition of genocide does not list class. In the end, in order to establish the necessary criteria, the court resorted to utilizing the self-identification mandated on required identification cards that had been instituted under Belgian colonial rule. Similarly, in the case of Cambodia: "The Khmer Rouge leadership gave each Eastern Zone cadre evacuated to the northwestern province of Pursat a blue scarf, not as a token of honor or of loyalty to the state, but as a 'sign' to distinguish them from the other loyal, 'pure' Khmer."[80]

Still, a considerable gulf exists between systematic mistreatment as a method of domination and policies directed at minorities that promote genocide or crimes against humanity. True, the use of systematic terror as a means of control can rise to the level of crimes against humanity. At the very least it would constitute a grave offense in terms of contemporary human rights law. But keep in mind that the purpose here is to examine the roots of the most serious of violations. To reiterate an earlier caveat, this observation should not be taken as an excuse or justification of situations. It merely restates a simple purpose to emphasize the main focus.

At the beginning of the Rwandan bloodbath, on orders from the central government, local authorities organized killing squads. Jean Hatzfeld had the opportunity to interview Hutus who had played a part in the massacres. One participant stated: "The first day, a messenger from the municipal judge went house to house summoning us to a meeting right away. There the judge announced that the reason for the meeting was the killing of every Tutsi without exception."[81] Another said: "The judge told us that from now on we were to do nothing but kill Tutsis. Well, we understood, that was a final plan."[82] Still another stated: "The intimidators made the plans and whipped up enthusiasm; the shopkeepers paid and provided transportation; the farmers prowled and pillaged."[83]

The point is that genocide and other forms of mass atrocity do not happen spontaneously. They require justification and planning to move ordinary individuals from passive antipathy to positive action and *to sustain* effort after initiation. Robert Lifton states that genocide requires two groups: a professional elite that formulates and supervises the killing, and those who actually kill.[84] In this case, a theater analogy may help. For every production, there are playwrights who develop the plot, but for the work to reach the stage, it needs producers, directors, and stagehands to perform necessary tasks before the actors, the cast, can perform. Without those essential elements, nothing happens. The story remains on the printed page. Hatreds may exist, but without concerted direction and focus they produce sporadic outbreaks of abuse, not a sustained campaign. Mass atrocity and genocide require persuading large numbers to participate in a prolonged and persistent endeavor.

Justification: Psychological Conditioning

The discussion in chapter 1 included democide and politicide. These two definitions focus on a sad fact. The state, presumably the protector of its residents, has played the principal role of planner and director of mass atrocity and genocide over the past century. Jason Campbell makes a vital point: "The attempt to increase the efficiency with which human lives are destroyed or to maximize casualties requires a deliberative process wherein assessments are made and consequences compared to the ultimate goal or solution."[85] In the contemporary world, the institution that has the requisite tools and access to population is the sovereign state. R. J. Rummel asserts: "The more power a government has, the more it can act arbitrarily according to the whims and desires of the elite, and the more it will make war on others and murder its foreign and domestic subjects."[86] Presumably pluralist democracies provide a check against the possibility of genocide and other mass atrocity because competing interests and broad participation in the political process limit the authority and power of those who govern and their capability to create the necessary preconditions.

Keep in mind an important point—no one set of factors explains every case because genocide appears in various forms and guises, each characterized by different goals and motivations.[87] Nonetheless, *at a more general level, the architects and promoters of genocide portray diversity, whether ethnic, racial, religious, or ideological, as a threat that taints or corrupts values important to the majority.* In the Rwanda cases, the experts employed by the ICTR to provide background agreed that in all instances of conflict between the two groups, there had been a *political reason* to exploit the perceived differences.[88] Justification entails making the perpetrators believe that the victims have something they want—that victims stand in the way of accomplishing some exceptional goal that has very great importance for the nation, or perhaps the members of the target group have become scapegoats for some perceived common national tragedy.

With respect to Armenia and Nazi Germany, the justifications used the same logic. Armenians and Jews became defined as the historic enemies of an authentic, grassroots, and "pure" movement toward national or societal progress. Because by their presence they challenged and undermined the struggle for unity and/or redemption, they had to be suppressed and/or, preferably, rooted out. What Armenians or Jews may have seen as a brief window of opportunity, signs that they had an opportunity to be included in society on equal terms, instead was seen by the Committee on Union and Progress, in Turkey or Nazi regimes as the real beginnings of the malaise—the moment when societal corrosion began, the time when their inclusion began to sap the vital forces essential to progress. For the CUP and Nazis, this validated the goals of their policies.

In Bosnia, even though the public rationale masked the real reasons, Milošević and his supporters successfully promoted the idea of rectifying an historic wrong and ending the persecution and discrimination of Christian Serbs by a predatory Islamic state.[89] Pinochet claimed extreme threats to Chilean national security. Pol Pot and the Khmer Rouge in Cambodia (Kampuchea) wished to return society to a simple agrarian economy with Communist principles in an effort to purify the state.[90] Hutu leaders played on the longtime domination by Tutsis—a shared history of conflict and antagonism brought about a power struggle that resulted in genocide.[91]

ORDINARY PEOPLE

Individuals still have to buy into the justifications advanced by others as sufficient to trigger actions that violate personal moral standards.[92] Albert Bandura and his colleagues examined how individuals justified behavior that had detrimental impacts on others. In normal circumstances, socialization will develop "self-sanctions" (a guilty conscience) for violations of moral behavior. Bandura argues that "it is through the ongoing exercise of self-influence that moral conduct is motivated and regulated."[93]

Normally, anticipatory self-sanctions keep conduct in line. Deviation from expected norms occurs when two factors come together to lower inhibitions—the muting of personal responsibility and the dehumanization of the target of the behavior. In these circumstances, when behavior does not conform, individuals seek ways to reconcile the gap between their performance and the normal moral standard. This process entails a process of "moral disengagement" in the sense of finding justifications that will validate the conduct by negating the normal self-censure.[94] Bandura identified four types of justifications: (1) dehumanization, blaming the victim, (2) displacement of personal responsibility, (3) minimizing, ignoring, or misconstruing the consequences, and (4) palliative comparisons, euphemistic labeling.[95]

The process of dehumanization necessitates the total exclusion of the target group from the value system of the majority. The process involves creating unflattering stereotypes. The victim group becomes characterized in unflattering ways (a form of euphemistic labeling): "gooks," "chinks," "niggers," "nips," "kikes," "huns," "vermin," or other equally derogatory terms make them a faceless part of a menacing presence. Philip Zimbardo asserts that "sticks and stones may break your bones, but names can sometimes kill you."[96] In Rwanda, Tutsis were called *inyenzi*, the Kikuyu word for "cockroach."[97] In their colonies, Germans referred to the locals as "baboons" or "vermin."[98] In any culture, one knows the appropriate treatment for a cockroach or vermin. The process of dehumanization applies to killing on the battlefield as well. It serves an important function by providing a mechanism that gives those who participate a psychological separation from the idea that the victim may be someone like themselves. If the targets lack characteristics that merit respect, then killing or abusing them does not violate fundamental moral standards because victims do not belong to the same moral universe.

Acceptance of the "nonhuman" portrayal of a group considerably reduces the possibility of empathy with the victims. Perpetrators come to believe the victims deserve their fate. A perpetrator in Rwanda said: "We no longer saw a human being when we turned up a Tutsi in the swamps. I mean a person like us, sharing similar thoughts and feelings . . . [S]avagery took over the mind."[99] Another said: "They had become people to throw away, so to speak. They no longer were what they had been."[100] General Lothar von Trotha, upon his arrival in German South-West Africa to take command of German troops in the Herero-Nama insurrection, declared that "no war may be conducted humanely against non-humans."[101]

The previous section discussed the role of leadership (often the state) and the necessity of placing the target group outside the moral spectrum of the majority (dehumanization) to provide necessary moral and emotional distance. Closely related to these factors is respect for authority, which underlies the willingness to respond to the pleas, demands, and explanations of trusted leaders, as well as responses in more proximate circumstances where an authority figure is present. Respect for authority forms one bridge across the divide between participation and nonparticipation. A second entails group accountability to fellow members. Other factors that promote physical and emotional distance from the targets constitutes a third. These can result in a diffusion of personal responsibility, which absolves the individual because others are in charge or responsible or share equally in the blame.

Authority, Leadership, and Responsibility

Obedience to authority is ingrained in most individuals from family structure, from schooling, from church, and from work. In everyday situations, people obey orders because they believe the authority giving them has legitimacy, they seek rewards for their behavior, or because they wish to avoid the negative consequences of disobedience. Researchers think several factors cause people to carry obedience to extremes. In more extreme situations, people obey even when they are required to violate their own values or commit crimes. In the trials following World War II, many accused war criminals claimed they were merely following orders so should not be held responsible for their actions. These claims have always raised serious doubts from outside observers, including psychologists. Looking back at the Holocaust, a Yale University psychology professor, Stanley Milgram, constructed an experiment to assess how far ordinary people might go in terms of inflicting injury if continually told to do so. Prior to the experiment, a team of psychiatrists predicted that only about one-tenth of 1 percent of the participants in the Milgram obedience research would fully obey the experimenter's commands.[102] Table 3.3 summarizes the structure of the experiment.

To everyone's surprise, all subjects obeyed until the shock level reached 300. Of more interest, 65 percent of the participants (26 out of 40) fully obeyed commands to administer the highest shock level despite the realistic cries of agony from the learner. In addition, all participants who reached the 450-volt level obeyed the experiment leader's command to continue by using the 450-volt switch until the experiment ended. None

Table 3.3
The Milgram Experiments

Milgram recruited 40 volunteers to participate in a study ostensibly on memory and learning for which they would be paid. The experiment involved a "teacher" administering electrical shocks to a "student" when the student gave a wrong answer. As the student failed to answer correctly the "teacher" was instructed to raise the level of electrical shock. The apparatus did not actually administer an electrical shock, but the controls had markings indicating settings that would be "severe shock" and "XXX." The teacher was told to increase the shock level with each wrong answer. The student deliberately played dumb, meaning the teacher had to raise the shock level continuously. A prerecorded tape provided responses from the student.

When the pretend shock level caused the subject to protest about the presumed painand demand that the experiment end, the experiment leader would give instructions to continue, starting with polite requests that then became more insistent and dictatorial the higher the shock level and the greater the seeming reluctance of the teacher to continue. The teacher would hear screams at 270 volts and silence at 345 volts. The experiment leader instructed the teacher to treat the lack of response as an incorrect answer, and raise the voltage. If asked a question about personal responsibility, the experiment leader would answer: "I am responsible." The session would end if, and when, the teacher refused to obey.

Source: drawn from Stanley Milgram, *Obedience to Authority* (New York: Harper & Row, 1974).

of the participants who refused to administer the final shocks insisted that the experiment itself be terminated, nor did they leave the room to check on the health of the victim without requesting permission. Many participants did become visibly upset as the experiment continued. They demonstrated a range of negative emotions about continuing. Some pleaded with the learner to answer questions more carefully. Others started to laugh uneasily and act strangely in various ways. Some subjects appeared emotionless. Some thought they had killed the learner. Nevertheless, participants continued to obey.[103]

Milgram concluded that obedience in these circumstances depended on three basic elements: (1) the prestige, proximity, and legitimacy of the person giving orders; (2) the distance from, and contact with, the student (victim); and (3) the perceived degree of personal responsibility. Maximum submission occurred when the person giving orders was in appropriate "uniform" (white coat), in close proximity (same room), and when the teacher subjects felt they could pass on responsibility to others. Compliance dropped considerably when the authority figure communicated by telephone rather than face to face and when the teacher could see and have physical contact with the student. These conclusions are consistent with studies of effective leadership on the battlefield.[104]

Ervin Staub advances an important point here. He argues that while obedience is an important force, it does not embody the fundamental motive for mass atrocity or genocide. A society's strong respect for authority forms only one source within the broad scope of factors that shape the nature of society.[105] If people share life problems and culture, they will likely identify with leaders and agendas that promise solutions. As a Rwandan *génocidaire* observed, "I think the possibility of genocide fell out as it did because it was lying in wait—for time's signal, like the plane crash, to nudge it at the last moment."[106] Perhaps the following quote from another Rwandan perpetrator summarizes all: response to authority, the importance of leadership, the retreat to agency (diffusion of responsibility), and

> we feared the authorities' anger more than the blood we spilled . . . I'll explain, when you receive a new order, you hesitate but you obey, or else you are taking a risk. When you have been prepared the right way by the radios and the official advice, you obey more easily, even if the order is to kill your neighbors. The mission of a good organizer is to stifle your hesitations when he gives you instruction. For example, when he shows you that the act will be total and have no grave consequences for anyone left alive, you obey more easily, you don't worry about anything.[107]

Proximity, Agency, and the Diffusion or Displacement of Personal Responsibility[108]

Grossman identifies physical and emotional distance as mediating factors.[109] Physical distance can result in emotional distance. William Manchester testified to being violently ill after he killed the sniper in close quarters. Browning recounts that many in Reserve Police Battalion 101 had feelings of revulsion after killing for the first time and asked to be excused from future such operations.[110] Those who did participate often drank heavily. The soldiers in the *Einsatzgruppen* (mobile killing squads) had a very high rate of alcoholism, desertion, and suicide. Causing or witnessing the deaths of scores of people, including women and children, took its toll. Several recorded cases described men breaking down, refusing orders, or being hastily transferred. Richard Rhodes reports that after the massacre at Uman in September 1941, within three days, one-fifth of the unit had been placed on leave of absence because "they were quite incapable of performing any duty."[111] Many unit leaders dispensed extra rations of alcohol as an incentive or reward.[112] In talking about the decision to use gas instead of firing squads to kill inmates, Rudolf Höss, the commandant of Auschwitz, observed:

> Another thing on my mind was the many suicides among the ranks of the SS Special Action Squads who could no longer mentally endure wading in the bloodbath. Some of them went mad. Most of the members of the Special Action Squads drank

> a great deal to help get through this horrible work. According to [Captain] Hoffle's accounts, the men of Globocnik's extermination section drank tremendous quantities of alcohol.[113]

In contrast, very few of the perpetrators in Rwanda seemingly expressed great remorse other than for the personal costs to themselves.[114] *Social and cultural distance can also produce emotional distance*. As discussed earlier in the chapter, that is the point of dehumanization.

Emotional distance can also result from the simple displacement of personal responsibility. Considering Milgram's first experiment, the fact that the experiment leader explicitly assumed responsibility for the consequences to the learner provided moral space and hence emotional distance for the teacher subject. The teacher simply became an agent "following orders." As agents, individuals will more easily accept rationales for violence, particularly if they already share common visions of problems, real or constructed. As noted in the statement from Ignace (Rwanda) above, receiving what is perceived as appropriate guidance may be a sufficient trigger in this instance.

The Influence of Groups, Situations, and Systems

Philip Zimbardo argues that the internal expectations and dynamics of certain institutions or systems can influence individuals caught within to do things they "could not imagine doing when they were outside those situational force fields."[115] Zimbardo believes that institutional structures like prisons, if not strictly controlled, can encourage degradation that results from the differential in authority, power, and status between groups. He cites the abuses committed by U.S. Army prison guards at Abu Ghraib in Iraq as an example. His own experience in designing and conducting another widely cited study, the Stanford Prison Experiment, contributed to his conclusions. Zimbardo offers an analogy: "Morality is like a gearshift that at times gets pushed into neutral" by circumstances.[116] But there is a darker conclusion as well. Abuse occurs because individuals think they can do so with impunity.

Consider, then, that as defined groups with their own culture and rules of operation, bureaucracies also provide both physical and emotional distance. Adolf Eichmann consistently denied that he had any personal responsibility for killing Jews—he was just an agent doing his duty and his job.[117] Bureaucracy and bureaucratic procedures can insulate individuals in the sense that they often remain far from the action with their own cultures and rules but nonetheless are complicit. Often the entire institutional/bureaucratic machinery of the state is geared to the tasks associated. Individuals will portray themselves as a small cog in a large machine—they only did what their role (position) required them to do.

In the Nuremberg trials, some individuals referred to "desk criminals" (*Schreibtischäter*)—those who give orders to others to do the dirty work but do not participate in the actual procedures.[118] They have not directly participated in illegal activities even though their actions enable others to do so. The physical and emotional distance permits them to compartmentalize their activities in a way that assuages feelings of guilt or responsibility. Individuals may do their job well for the rewards of promotion and greater salary regardless of the ultimate purpose. Typically, bureaucrats do not picture themselves as evil or criminal. They see themselves as working on discrete tasks and solving problems within their own small areas of responsibility. This becomes another mechanism, another way of insulating themselves from the ultimate purposes accomplished through their work. In part, the isolation and denial of complicity is what Arendt meant by the "banality of evil" when writing about Eichmann's defense at his trial in Jerusalem.

Personal Motives

A simple personal motive for not actively opposing policies that promote genocide is survival of oneself and safety for family. True, passive bystanders are enablers by their very inaction, but in reading through accounts of genocides, and the cases tried before the various international tribunals, one runs across a common but important point. *Not all crimes committed within the events associated with genocide are be motivated by the broad collective justification for the genocide. Some individuals will see the broader context as an opportunity to settle a personal grievance against an enemy or antagonist, to literally cancel a debt by killing the note holder, or as a license to act as a thug or rapist without repercussions.*[119] Indeed, a defense for a charge of genocide brought against an individual might argue that a specific motive occupied so strong a place in the mind of the perpetrator that it totally outweighed any evidence of genocidal intent. Note that such a defense would not excuse the commission of the crime.

ON KILLING: COLLECTIVE JUSTIFICATIONS AND THE "BLAME GAME"

To this point the discussion has focused on what might motivate *individuals* to participate in events associated with genocide or mass atrocity. In doing so, it has suggested reasons that relate to socialization, individual personality traits, authority, bureaucracy, and purely personal motives. The final question for this chapter focuses on the justifications that have been used to motivate large numbers of individuals to undertake or condone genocide. Scholars have suggested a number of classifications based on different criteria. To simplify, Table 3.4 associates a number of different rationales with recurring situations. In terms of both situations and reasons, the list is meant to be suggestive, not comprehensive. Moreover, certain rationales appear as potential factors in more than one situation. Those organizing mass killing might use more than one rationale, and categories can overlap (see Table 3.4). For example, ethnicity and religion are often bound together. Nationalism/security as an overarching explanation might be advanced to justify any or all of the actions in the table.

Ideology, whether religious or secular, when adopted uncritically, can justify the most heinous acts. Alain Besançon argues that "it is not possible to remain intelligent under the spell of ideology."[120] As an observation, much evil has been done in the world by individuals who have convinced others that they have all the right answers. Few have the insight demonstrated by an ardent Communist in reviewing the results of the process of turning farms into collective holdings:

> I was convinced that I was accomplishing the great and necessary transformation of the country-side; that in the days to come the people who lived there would be better off for it; that their distress and suffering were a result of their own ignorance or the machinations of the class enemy; that those who sent me—and I myself—knew better than the peasants how they should live, what they should sow and when they should plow.[121]

Table 3.4

Rationales for Genocide/Mass Atrocity/Democide

- Against indigenous peoples
  - imperial assumptions of superiority/entitlement
  - developmental genocide/economic "progress"
- During struggles for power or autonomy
  - struggles for control post-independence (decolonization or secession)
  - tribal/ethnic enmity
  - ideology
  - ethnic/national purity as essential to national identity/security
  - retribution for oppression
  - religious beliefs
  - security
- Against scapegoat groups
  - ethnic/national purity
  - religious beliefs
  - security

The psychological state of the militant results in a total intellectual investment in the system. Besançon observes that the thinking of Nazi and Communist leaders was "completely governed by an extraordinarily impoverished system of interpreting the world."[122]

One last caveat applies here. In searching for explanations, one must be wary of falling into the "blame game" trap. We tend to simplify history, perhaps for good reasons, but the forces that shape history are not necessarily simple, or even if simple, not explanatory in forms that we might like.[123] We like our history in "us versus them, white and black hat" style. We shun complications that add gray tints to the story. The emotional fabric that surrounds genocidal events, particularly with regard to survivors, enhances this tendency. Donald Bloxham notes that for survivors and those sympathetic to them, the horrific nature of the crime means that it must have resulted from a monstrous and preferably indisputable, personalizable criminal motive that links cause and effect by a thick, straight line.[124] Psychologically, "it is distinctly unsatisfactory, particularly for victims of genocidal regimes, to have massive suffering attributed to anything other than a discrete objectively repulsive . . . *ideological* hatred."[125]

Indeed, the depth and vitriol of the negative reaction to Hannah Arendt's articles and book on the Eichmann trial, where she dared to suggest the "banality," the quite ordinary character of his everyday actions, attests to this observation.[126] Apart from her assessment of Eichmann, suggestions that surfaced during the trial that some Jews had collaborated with Nazis created a firestorm even though eyewitness evidence existed to document the claim.[127] Fred Katz, a Holocaust survivor, wrote: "*Those persons most affected by horrendous deeds may unwittingly stand in the way of understanding the causes of the deeds*. The victims, in their passionate—and justified!—espousal of the uniqueness of the horrors that have befallen them, may hinder dispassionate analysis."[128]

Yet, as noted before, explanation and justification are two very different processes. *To explain is not to justify*. Raising unpleasant "gray areas," such as collaboration by members of the target group or actions in opposition to the regime, does not mitigate or excuse the crimes committed by the perpetrators. The role of Jewish collaborators in the Holocaust stands as a story by itself. *The fact that some Jews did cooperate with German authorities in the concentration camps does not diminish the guilt of the Germans involved in the killing, nor does it diminish by one iota the horrors suffered by those detained in them*. The fact that Ottoman Armenians had formed political parties and appealed to outside powers for support in an effort to secure greater rights of self-governance partially explains, but does not justify, the course of action chosen by the Ottoman regime in response.

CHAPTER 4

20th-Century Beginnings: German South-West Africa

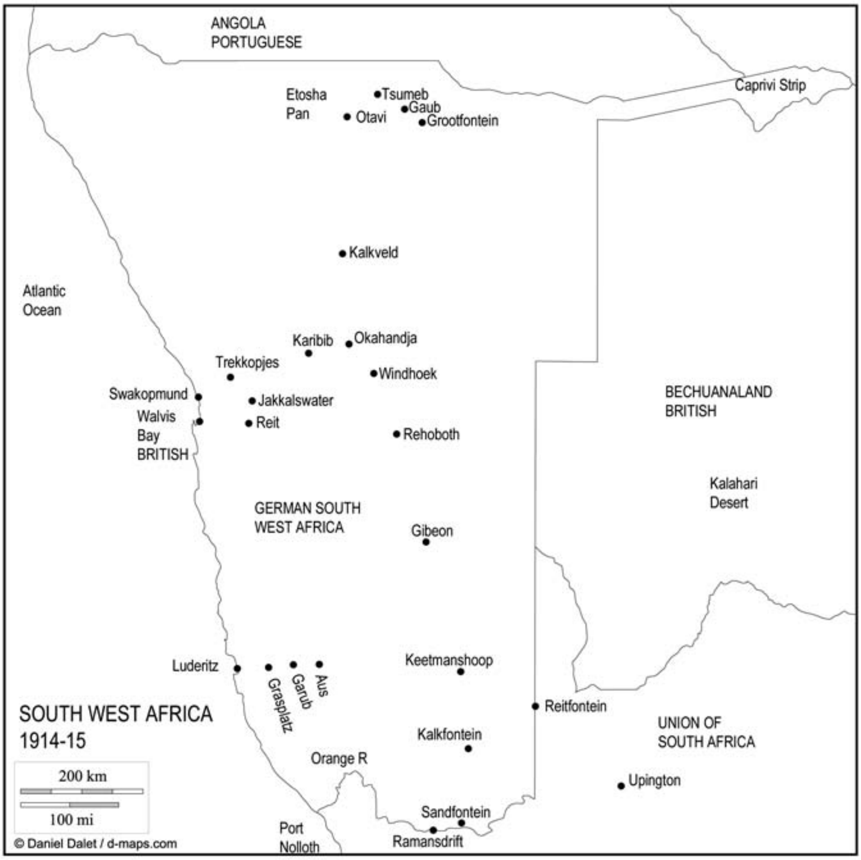
> The history of the Herero and Nama genocides is not of consequence only as an unheeded augury of the calamities that were to befall Europe in the twentieth century . . . To the descendants of its victims, the genocides are not a distant memory but an open wound that shapes their day-to-day existence.
>
> —David Olusoga and Casper Erichsen[1]

BEGINNING A CENTURY OF GENOCIDE

The first three chapters have drawn on a number of high-profile cases of genocide and mass atrocity to provide examples. Unfortunately, as noted earlier, the phrase "a century of genocide" aptly describes the 20th century. Still, until the events of the 1990s in Yugoslavia and Rwanda, spurred great interest in mass atrocity and genocide, the phrase "the triumph of amnesia," used by David Olusoga and Casper Erichsen, describes interest in what many now consider the first genocide in the century. Okahandja, a town about 42 miles north of Windhoek, the capital of Namibia, contains an interesting set of historical sites dating from the bloody insurrection that occurred there early in the 20th century (1904–1907). Within a short distance of one another, this small town has a cemetery for German soldiers killed in the war, and the graves of Herero chiefs, including that of Samuel Maherero, one of the leaders in the resistance to German colonization (see Map 4.1).

The graves in Okahandja and at Waterberg Plateau (140 miles northeast) are a vivid reminder of the cost to Germany of its short colonial occupation. Interestingly, apart from the monuments and graves honoring the chiefs (and the monuments at Monument Plaza south of Windhoek), nothing much exists to indicate and commemorate the horrific costs to the

Map 4.1


ANGOLA
PORTUGUESE
Etosha Pan
Tsumeb
Gaub
Otavi
Grootfontein
Caprivi Strip
Kalkveld
Atlantic Ocean
Karibib
Okahandja
Trekkopjes
Windhoek
Swakopmund
Jakkalswater
Walvis Bay BRITISH
Reit
Rehoboth
BECHUANALAND BRITISH
Kalahari Desert
GERMAN SOUTH WEST AFRICA
Gibeon
Luderitz
Grasplatz
Garub
Aus
Keetmanshoop
SOUTH WEST AFRICA 1914-15
Reitfontein
UNION OF SOUTH AFRICA
Kalkfontein
Orange R
200 km
100 mi
Upington
Sandfontein
Port Nolloth
Ramansdrift
© Daniel Dalet / d-maps.com

Herero and Nama. Marginalized after the massacres, they now maintain only a shadow of their former presence both in terms of official histories and current Namibian government concerns. No data based on a systematic census exists, but reputable estimates indicate that the war resulted in 60,000 to 90,000 Herero deaths from various causes. A report to the British Foreign Office in 1918 estimated that only 15,000 to 20,000 Herero survived.[2] Of approximately 20,000 Nama, 45 to 50 percent died in their rebellion. Jon Bridgman has observed that from the standpoint of Germans and other Europeans, the events in German South-West Africa in 1904–1908 were not important—"It was an *incident*, and not more, in an imperial adventure which has now ended."[3] In this case, the incident did not even merit the status of a "question" until many years later, even though the result reduced both tribes to a marginal presence.[4]

The quote heading the chapter also describes the aftermath of the Armenian case. A hundred years later it burns in the memory of descendants. It also points to a different issue in terms of "amnesia"—denial. Various estimates put the death toll in Armenia at 1–1.5 million.[5] Because of the attention generated at the time and the activities of Armenian communities around the world, the Armenian genocide has usually served as the defining case that precedes the Holocaust in Nazi Germany. The Armenian case does play a special role in the evolution of international awareness about genocide. The events in Turkey and the lack of international action combined with the policies and practices of Nazi Germany sparked the crusade of Raphael Lemkin to inform people, generating the impetus for the 1948 Genocide Convention. On the downside, the promise of the convention obviously did not translate into effective action by the international community. Moreover, despite the vast amount of evidence that points to the historical reality of the Armenian genocide—eyewitness accounts, official archives, photographic evidence, the reports of diplomats, and the testimony of survivors—from the time of initiation of the equivalent of a "final solution" in 1915, successive regimes in Turkey have denied what occurred.[6] *The New York Times* has noted that "the Turkish government considers even discussion of the issue to be a grave national insult, and reacts to it with hysteria."[7]

GERMAN SOUTH-WEST AFRICA AS AN EXAMPLE OF A TYPE[8]

Previous chapters have drawn occasional examples from different colonial experiences to validate points, but this book does not examine in depth the treatment of indigenous peoples over the past 500 years. Nonetheless, a certain set of common beliefs underlay policies that promoted colonial expansion, as well as those of governments in various countries when confronted with "the problem" of how to deal with demands that land and resources controlled by original inhabitants be made available for colonists who, in their view, would better utilize them. Europeans in the 19th century shared a belief that only the application of overwhelming force would establish peace in the "uncivilized" world, but, without peace, "civilization" could not exist.[9]

A propagandist and apologist for colonial policies stated the case for taking the land based on "a law of existence in the highest degree," because, "for a people, as for an individual, an existence appears to be justified in the degree that it is useful in the progress of general development."[10] Indeed, that law of existence meant that "these races should be made *serviceable* in the enjoyment of their former territories by the White Races."[11] In 1866, Frederick Farrar, later to become dean of Canterbury Cathedral, wrote: "They are without a past and without a future, doomed . . . to a rapid, an entire, and perhaps for the highest destinies of man, an inevitable, extinction."[12] Given these attitudes, conflicts in colonies often became genocidal. The conventions and rules of war within Europe did not apply to wars involving the "uncivilized" and "uncivilizable." Olusoga and Erichsen note:

> Through much of the nineteenth century, empire building was portrayed in Europe as a noble crusade, an act of charitable paternalism. The colonial massacre and the punitive raid clashed with this fiction and were hidden from the public gaze, little discussed outside military circles. Even today they remain relatively obscure in Europe.[13]

These peoples became victims of a particular vision of progress.[14]

Roger W. Smith characterizes the result as "utilitarian genocide" that occurred as explorers and colonists came in contact with indigenous peoples in the Americas, Australia, New Zealand, Africa, and Asia.[15] Smith argues that the desire for land, resources, and cheap labor produced policies and actions driven by a "combination of ethnocentrism and simple greed"—that is, race, living space (*Lebensraum*), and avarice.[16] The German settlers in South-West Africa regarded Africans as little better than unwanted animals who occupied land they desired. They, and many advocates for an aggressive colonial policy in Berlin, felt that the indigenous population had absolutely no right to existence except as lowly paid workers or servants.[17] Frank Chalk and Kurt Jonassohn add that, in many cases, a substantial number of killings and deaths happened because settlers, whether from fear, greed, simple racism, or just because they could do so with impunity, took independent actions that governing authorities ignored or sanctioned because they had little concern for the indigenous population or lacked the capacity to do otherwise.[18] Isabel Hull argues that atrocities committed against indigenous populations were "certainly so common in imperialist practice that they must be regarded as standard operating procedures."[19]

The missionaries shared the idea that they formed the forward phalanx in spreading the benefits of a superior civilization among those governed by "unspeakable abominations and vices."[20] They emphasized their noble calling and accomplishments in improving the conditions of native life. If the effort called for them to act as commercial agents and engage in the firearms trade as a means of promoting order in a chaotic situation, they had few qualms about doing so. Occasionally the missionaries attempted to intervene to mitigate some of the evils they saw occurring as the number of settlers increased. One should not overplay either their influence or their motives. Perhaps the satirical hymn published in *Truth* around 1900 captures the hypocrisy: "Brethren! Oh! Be not afraid, Heaven your Christian work will aid; Banish all your doubts and tears, Rifles cannot fail 'gainst spears."[21] Whatever their motives, the efforts to preserve Herero lands put them at cross-purposes with the settlers who saw the initiatives as completely contrary to their own desires and interests.[22] In the end, perhaps for humanitarian motives, they became instruments of "ethnic cleansing," cooperating with colonial authorities in rounding up the Herero for transport to the prisons and forced labor camps.

This short introduction does not exhaust all of the reasons for which indigenous people have been targeted. Obviously it does not fit Darfur (chapter 2), Rwanda (chapter 3), Uganda (1971–1979), or Somalia (1977–1978, 1988–1991). It does, however, give context to the events in many historical incidents in Africa, the Americas, and Australia. It constitutes a close cousin to the more modern "developmental genocide," where governments deem a marginal indigenous population as a complicating factor in a major economic development project. For its role in funding such projects, the World Bank has received bitter criticism from a number of high-profile international NGOs for not undertaking more comprehensive social and environmental impact assessments and for inadequate compensation and resettlement programs.[23]

THE PEOPLE AND CONFLICTS BEFORE GERMANY ASSERTS ITS CLAIM

Histories of South-West Africa mention a number of tribes: Ovambo, Herero,[24] Nama (Hottentots),[25] Basters, Bushmen, and Berg (black) Damara. These names are based on an ethno-linguistic nomenclature developed by Europeans, not on how these small kin-based societies describe themselves and each other. From an ethno-linguistic perspective, the groups belong either to the Bantu or Khoi language groups. The Herero were divided into three distinct groups. Matrilineal ties governed inheritance of property, while the patrilineal lines governed the religious aspect.[26] The Herero had the largest herds of cattle and occupied the best pastureland. The Nama (Hottentots), though fewer in number, had eight different identifiable groups, each associated with a particular geographic area, but groups sometimes went by the name of their chiefs (e.g., the Witboois and Franzmans).[27] In the final confrontations with German authorities, only the Herero and the various Nama groups play a major role. As part of the backstory here, note that while each tribe had a chief, even the richest chief did not have paramount authority. All cattle owners shared in the decision-making process. Intertribal authority was almost nonexistent in the sense of formal arrangements. Each chief ruled his own tribe. Any action taken in common required the assent of all the chiefs.[28]

Beginning in 1830, the Nama and Herero fought a series of wars over increasing pressure on Nama lands from Herero herders seeking grazing land for their cattle. These wars dragged on because, after some initial skirmishes, they consisted mainly of sporadic cattle-stealing raids and small-scale tit-for-tat reprisal actions. Although often described as between Nama and Herero, the conflicts reflected a far more complex set of relationships. Gesine Krüger asserts that rather than an ethnic conflict, the fighting consisted of raids for plunder and retaliatory measures between loose confederacies that often included Nama and Herero as allies.[29] In the first two "wars," the Nama eventually emerged as dominant because of the leadership and personality of the Orlam-Nama leader Jonker Afrikaner. In 1840, Afrikaner and his subordinate Herero allies, which included the Herero chief Tjamuaha, controlled the whole of central South-West Africa. Afrikaner had negotiated treaties with southern Herero chiefs that offered military protection. These treaties underpinned an extensive system of tribute payments that encompassed everyone, including missionaries and traders.[30] Some Herero chiefs adopted the system, using it to build their own power and personal cattle herds.

In the third conflict, dubbed the "war of freedom" by the Herero, having acquired firearms and horses, the Herero managed to end the ascendancy of the Orlam-Nama. Out of the conflict the Herero chief Maherero ka-Tjamuaha (son of Tjamuaha or Kamaharero) emerged as the dominant figure, gaining the title "paramount chief." Concerned with the ongoing violence and mistrust, he requested the Cape Colony government to send a commissioner to explore ways of ending the tribal violence. William Coates Palgrave, known and trusted by Kamaharero, accepted the task. Palgrave found himself caught between the distrust of the Namas and the politics of the Cape government, which still had to bow to the "guidance" of Great Britain with respect to external policy. In frustration, Palgrave withdrew and left in 1880 after a border incident restarted hostilities. Bridgman writes that "with his withdrawal . . . missionaries and traders had no protection at all, and many of them were forced to leave their stations."[31]

The chaotic and divisive state of affairs set the stage for German penetration. The fourth war began in 1880 over a minor border incident. It would last for 12 years. Bridgman writes that unlike the previous wars, which had stimulated trade, this one ruined the white traders and set the stage for German penetration because missionaries and others now actively sought outside intervention.[32] Note that at this point, the first German colonial *settlers* would not set foot in South-West Africa until 12 years later.

GERMANY AS A COLONIAL POWER

Germany's stint as a colonial power had a short, bloody history. Late into the overseas expansion game because Bismarck had opposed colonies for both economic and strategic reasons, Germany also became the first country to exit, stripped of all colonial holdings during and after World War I. When finally pushed to consider colonial acquisitions, Bismarck sought to do so on the cheap; that is, he wished to avoid setting up a formal administrative structure with its attendant costs by making those interested in the enterprise bear the total expense of development and governance, albeit under German sponsorship. Considering the areas claimed by other European powers, South-West Africa was an area that no other country engaged in colonial acquisition thought desirable, except for the natural harbor at Walvis Bay and the nearby guano deposits. Of the four African territories conceded to Germany, two—Togo and Cameroon—would not support settlers because of the prevalence of malaria and yellow fever. They would remain essentially trading colonies. German East Africa (Tanganyika, Burundi, Rwanda) and German South-West Africa would never turn a profit after Germany assumed direct control.

In 1882, Adolf Lüderitz, a Bremen merchant, informed the German government of his intention to establish a factory on the west coast of southern Africa. He asked for German protection should the need arise. He obtained rights to 215 square miles from a Nama chief. By subsequent treaties, his holdings were extended southward to the border of the Cape Colony at the south bank of the Orange River. The Germans raised their flag on African soil for the first time on May 12, 1883. Reluctantly, Bismarck agreed to place "Lüderitz Land" under the "protection of the Reich." Subsequent events illustrate some unpleasant facts about what matters to those in charge of conducting foreign policy. The declaration had little meaning beyond the assertion of German interest. Lüderitz assumed all responsibility for administration and development. Financial setbacks led Lüderitz to begin negotiations with a group of British businessmen. Bismarck stepped in by orchestrating the creation of a company (German South-West Africa Colonial Company) to buy the remaining assets of the Lüderitz company. The company came close to bankruptcy within the first year after its creation because investors had little incentive to make further investment without a return.[33] In order to counter possible encroachment by the British, Bismarck appointed Heinrich Ernst Göring (father of Hermann Göring) in 1885 as the first acting German imperial commissioner for South-West Africa.

Göring succeeded in negotiating a treaty of "protection" with Kamaherero. It had no real substance because a German military presence would not materialize until the summer of 1889. The treaty exemplified a classic misunderstanding of what "protection" meant. The Herero wanted protection from their enemies. Presumably Göring and the missionaries shared this interpretation, but authorities in Berlin saw the treaty only as a warning to keep other states away. Angered at the actions of the German prospectors who had arrived in large numbers in August 1887 in search of gold that did not exist, and at the inaction of the German government, Kamaherero ordered Göring and his associates to leave in late October 1888.[34] They complied by moving to Walvis Bay.

The politics of the situation became interesting. A serious discussion of the worth of the colony occurred in Berlin. Bismarck and the South-West Africa Colonial Company both resisted requests to send a major expeditionary force.[35] Yet when it appeared that Britain had an interest in expanding its influence, for reasons of national pride and honor, Bismarck reacted. His response provides a lesson in classic foreign-policy reasoning. Germany had expended too much diplomatic capital in acquiring South-West Africa; it could not simply let it go without looking foolish in the eyes of other European states.[36] Bismarck consented to send a small detachment under the command of Captain Curt von François (June 1889) as an indication of commitment. The decision would have unforeseen and far-reaching consequences. In October 1890, when the Herero had temporarily withdrawn from the Windhoek region to move south to put pressure on the Nama, von François seized the opportunity (against his instructions) to occupy the area and begin building fortifications.

The question of what to do with South-West Africa remained open when Leo von Caprivi replaced Bismarck as chancellor early in 1890. Over the next two years, procolonial advocates slowly increased their influence, especially with the young Kaiser Wilhelm II. Small commitments grow once made, particularly if other countries seem to challenge. Caprivi finally jumped on board: "South West Africa is ours . . . How it all happened and whether it was a good thing or not is irrelevant now. It is ours, German territory, and it must remain so."[37] From this point on, German policy moved from simply striving to maintain its hold on South-West Africa to a plan of active conquest, settlement, and exploitation. Von François had never believed that any other course was acceptable.

The Raid on the Witboois

From his arrival in South-West Africa, von François had ignored his orders and proceeded to take what he regarded as the necessary actions to transform the area into a proper colonial holding. He had served as a mercenary for King Leopold in the Belgian Congo. The experience left him with very decided views on what needed to be done. Shortly after his arrival, he had written: "The Europeans [here] have failed to give the black man the right kind of treatment. They have made too many concessions . . . without bearing in mind that this is only interpreted as weakness."[38] Frustration came from Berlin's seeming indifference and refusal to send more troops. In November 1892, Samuel Maherero and Hendrik Witbooi signed a pact ending the 12-year war. The possibility of a united front against further German expansion now loomed as a real threat.

How much the Herero-Nama treaty influenced Reich Chancellor Caprivi's change of heart will never be known, but he authorized a major upgrade to the German military presence. Two hundred sixteen more soldiers arrived in late March 1893. This gave von François a force large enough to undertake offensive action. He immediately made plans to attack the Witboois at their camp at Hornkranz. In the early morning of April 12, 1893, German forces surrounded the camp. The orders issued by von François left little doubt about the purpose: "The object of this mission is to destroy the Witboois."[39] Interestingly, the attack killed few of the men, but reports indicate that 78 women and children died. The next day troops pulled down the village wall and set the buildings on fire. Witbooi escaped. The attack was justified as punishment.[40] If so, the question becomes, punishment for what transgression other than standing in the way of German occupation? Over the next year, Witbooi's actions in retaliation would humiliate von François and eventually persuade Berlin that he was no longer capable of dealing with the situation.

Major Theodore Leutwein Assumes Authority

Major Theodore Leutwein would serve as governor and military commander for 10 years. In November of 1893, Leutwein received a commission to evaluate the situation in South-West Africa. Arriving in January 1894, he immediately grasped how little real influence Germany had. Based on his report, Berlin appointed him governor and military commander. Leutwein had studied British colonial strategies, particularly that of "divide and rule." He set as his first order of business establishing a more permanent foothold in the colony. As a military man, he certainly was not averse to resorting to force, but unlike von François, he understood how to couple force with diplomacy in taking many small, effective steps rather than "going for the jugular" in a situation where he did not necessarily occupy a superior vantage point or when other strategies might produce an acceptable result without bloodshed. His strategy consisted of isolating and confronting each separate tribe one by one, divesting them of their independence and land in small pieces. In the process, he hoped to undermine the power of the chiefs and break up clan unity.[41] His initiatives moved German control of South-West Africa on a steady course toward total domination and submission.

To begin his strategy, in February 1894, Leutwein led 100 troops to the Khaua (Herereo clan) territory and started negotiations. In March, he captured Andres Lambert, the chief, who then accepted the conditions of an agreement that recognized German authority as well as the surrender of arms without cession of land. Subsequently, Leutwein released Lambert. Instead of honoring the agreement, Lambert tried to escape, but he was recaptured and publicly executed. Lambert's brother signed the agreement. Still, perceptions of leniency toward the indigenous population by settlers who resented Leutwein's policies and the prosettlement faction in Berlin undermined his efforts. Though written in 1902, the following editorial expresses the sentiments of many on the principal purpose of a colonial government:

> A colonial government . . . must have the aim to expropriate the natives of part of their land in order to create farm land for farmers; it must also curtail the freedom of the natives to a large extent in order to ensure sufficient native labour, without which the white farmer and settler will be lost.[42]

Leutwein quickly moved to force several of the minor clans to accept German suzerainty. As part of his strategy of gaining land without military action, Leutwein used bribery as well as diplomacy and force. Coming to terms with the Witboois in September 1894 was a major accomplishment. The remarkable aspect of the treaty stemmed from the agreement to permit Hendrik Witbooi to keep a large part of his traditional land and territory and pay him an annual stipend of 2,000 marks. Criticism flowed almost immediately in that Leutwein had neither destroyed the Witboois nor imposed a more punitive settlement on them. The tenor and content of the criticism embodied a constant theme. For the next 10 years, Leutwein would be subject to the complaint that the confiscation of lands from the tribes was not occurring fast enough because he and local administrators were much too lenient in dealing with the indigenous population. In defending his actions, Leutwein wrote: "Victory alone is of no avail and severe punishment will only produce a secret enemy intent on casting off his shackles."[43] He also complained that "Major François has left me a bad legacy with which I will remain saddled for a long time to come. However ruthless one's colonial policy, it is necessary to give one's actions a semblance of legality."[44]

Still, slow, steady, and sure did not match the mood among the settlers. The quick conquest and subjugation vision of von François drove policy among the settlers and, increasingly, gained favor in Berlin. This intensified as settlers realized that South-West Africa had little arable land that could support intensive farming. The realization that settlers would need to be ranchers, not farmers, amplified demands to have more native land opened for settlers. Over the next few years, white cattle ranchers placed great pressure on colonial authorities to expand the land available for pasture, in this case, mostly at the expense of the Herero because they held prime pastureland in an otherwise arid environment.

Samuel Maherero

Samuel Maherero left a mixed legacy in that he personally benefitted from cooperating with the Germans in a manner that permitted an enhanced German authority and presence at the expense of other Herero clans. Late in 1894, Leutwein made an agreement with Maherero that redefined Herero rights and lands in a way that enriched Maherero and established a German garrison at Okahandja. The agreement gave Maherero a share of the profits from land and cattle sales as well as an annual subsidy.[45] He also benefitted from Leutwein's support for his position as paramount chief over the rightful heir, Nikodemus Kavikunua. By Herero tradition, the tribe held all land in common. The chief had no more rights than any other member of the tribe. Maherero had no authority or right, even as paramount chief, over the tribes whose land and cattle he authorized to be sold. He agreed to cede a "Crown territory" (land placed at the disposal of the German governor) in the north that impacted the tribes who had already been disadvantaged by their dealings with the Germans.

These newly drawn boundaries led to a constriction of Herero territory but did not satisfy demands by German settlers for additional acreage. In fact, the demands of settlers for Herero land actually increased. Herero soldiers loyal to Maherero joined with Germans in border patrols and enforcement of treaty provisions that included forced expulsions and confiscation of cattle.[46] Cattle seized for "border transgressions" were sold at public auction, with Maherero sharing in the profits. The collusion with the Germans at considerable detriment to those not allied with him, as well as unease on the part of some who were, seriously undermined Maherero's authority. Leutwein wrote an accurate and damning assessment: "In order to please us, he did more harm to his people than we could ever have done by relying on our strength alone."[47]

At the same time, Leutwein took advantage of Kavikunua's animosity toward Maherero by recognizing his request for recognition as an independent chief. In return for land concessions, Leutwein endorsed and supported Kavikunua as the chief of the Eastern Hereros, independent of Maherero, thus playing the two against each other.[48] This fueled additional discontent because it favored Kavikunua over other chiefs without providing any obvious benefits. Leutwein's maneuvering had the goal of isolating the Eastern Hereros. When Kavikunua began to see German patronage as providing no positive advantages in protecting his interests from encroachment, he began to see the Germans as the problem and to explore the possibility of finding allies to resist further encroachment.

In March of 1896, Kavikunua joined forces with the Ovambanderu of Kahimemua and the Khuan-Khoi of Lambert in an action against the German garrison in eastern Hereroland. Samuel Maherero and Hendrik Witbooi fought with the German colonial troops. Horst Dreschler notes that the execution of prisoners and other practices foreshadowed policies that became a matter of course in the 1904 rebellion. Leutwein wrote that to be humane toward "rebellious natives is to be inhumane towards our own fellow countrymen . . . Any colonial policy is an inhumane affair because it can ultimately lead only to a curtailment of the rights of the indigenous population in favour of the invaders."[49] At the end of hostilities, Leutwein staged a court-martial for Kavikunua and Kahimemua that sentenced both chiefs to death by firing squad. German forces took the opportunities generated by the conflict and its aftermath to confiscate over 12,000 head of cattle as "reparations."

Plague, Pestilence, and Parched Earth: Rinderpest, Typhoid, Malaria, Locusts, and Drought

A series of events that tipped the scales in German favor occurred over the next three years (1897–1899). Cattle formed the fabric of Herero society. Not only were cattle a source of wealth, they were also the pivotal point of a complex and interwoven religious, social, political, and economic system. The Herero language has over 1,000 words for cattle,[50] and stealing, killing, or mistreating cattle equated to an overt declaration of war. *Rinderpest* ("cattle plague" in German), a relative of the measles virus, begin to spread among all cattle herds. First appearing in Southern Africa in the late 1880s, the most virulent strains killed *95 percent* of the herds they attacked.[51] The epidemic, combined with a drought, resulted in almost total impoverishment of the Herero and Nama within a six-month period. The crisis entailed much more than a simple economic reversal. Because cattle formed such a central part of a way of life, the entire social and political structures of tribes began to crumble. Without the milk and meat, the staple foods cattle provided, starvation and disease took a great toll as well. In the spring of 1898, epidemic outbreaks of typhoid fever and malaria added to the woes. Locusts consumed the crops desperately planted in hope of providing some food until herds could be rebuilt. To cap the misfortunes, a severe drought killed even more cattle and withered the remaining crops before harvest.[52]

Beyond the loss of cattle, the most serious long-term consequences came from the changes in the status of land tenure in the tribes. Traditionally, tribes held land in common. It was not considered as a commodity that could be bought or sold. Samuel Maherero had broken this pattern when he had sold land to the Germans. The loss of cattle had placed many of the chiefs deeply in debt. German traders pressured them to settle what they owed through land sales since they could no longer do so with cattle. This permitted settlers to gain more than token areas in Hereroland. Leutwein took the opportunity generated by the hardships to expand German influence and open up some additional land through actions against some of the smaller tribes. In the three years just before the Herero rebellion, the number of settlers tripled. Yet, by the turn of the century, the Herero had managed to rebuild their herds. The best land in South-West Africa still remained largely in the hands of the Africans.[53]

PRELUDE TO GENOCIDE: A SHORT SUMMARY

To this point, the discussion has focused on racism and greed—the competition for land and cattle—as proximate motives, with the underlying theme of the politics and imperatives of imperial expansion that drove colonial policy and validated many of the actions to consolidate German control. By the time of the Herero rebellion, one needs to add the extreme impatience and frustration of German fortune seekers, settlers, and soldiers to the contributing factors. Racism had reinforced a mind-set among these groups that fostered an obsessive sense of entitlement. As their numbers grew, so did the general disregard for the African population coupled with mounting dissatisfaction with, and complaints about, the pace at which land was becoming available. Fraudulent trading practices as well as physical abuse and violent crime against Africans had become major problems. In the eyes of many Europeans, the livestock had more value than any African. The newer arrivals, in particular, saw the black African as nothing but a potential source of cheap labor at best. Some even raised the question whether the colony would not be better off if the black population were completely eliminated.[54] Whites were not subject to African law, and colonial authorities and courts had little incentive to pay more than cursory attention to crimes committed by whites against black victims, even if the offense was rape or murder. If trials did occur, defendants were acquitted or given extremely light sentences.[55]

The pressure on their way of life and means of economic survival, the total disregard of fundamental rights, and the continued breach of solemn agreements and promises had pushed the tribes to the breaking point of their tolerance. The treaty of protection and friendship stipulated that the Germans would respect the habits and customs of the Herero. Yet, relations had come to a point where the tribes in reality had no rights in, or with respect to, their own lands. A plan to force the tribes into reservations provided the impetus needed to move a seething and building passive resentment to the point of active resistance. An ordinance issued by Leutwein in November 1903 to address African debt caused by usurious lending practices instead led to abusive collection strategies. The systematic expropriation and seizure of land and cattle, often on flimsy pretexts, and the lack of respect and protection from depredations by settlers finally produced a situation where "they preferred to die arms in hand rather than wait in resignation until their last possessions had been taken away from them."[56]

RESISTANCE BEGINS

An uprising by the Bondelswartz (Nama) began in October 1903. The principal source of Bondelswartz grievances stemmed from agreements made in 1889–1890 by their chief, Willem Christian, to sell most of the tribal land to the Kharaskhoma Syndicate. This transaction and subsequent efforts by the company to claim their prize had been at the root of sporadic unrest and rebellion over years. An attempt to enforce a gun registration requirement by an overzealous local garrison commander resulted in the death of three German soldiers and the chief. This sparked another uprising against German occupation. When fighting dragged on, Governor Leutwein personally led a force of 500 to the site of the rebellion in the south, leaving few soldiers in the central part of the country.

In Hereroland, anger over the desecration of graves and attempts to establish the reservations by force and fraud on the part of the local commander, Lieutenant Zürn, had set the stage. The rebellion only needed some incident to transform smoldering resentment into the flames of open rebellion. Dreschler observes that while no written record of debates and discussions exists, the Herero had been planning a revolt for some time.[57] Samuel Maherero had written letters to Hendrik Witbooi and other chiefs in an effort to generate a united front against German rule. Witbooi never received the letters because another chief (of the Rehoboths) turned them over to German authorities. One letter contained the memorable phrase that became the watchword for the rebellion: "*Let us die fighting* rather than die as a result of maltreatment, imprisonment or some other calamity."[58]

The events that triggered the first confrontations were totally unplanned. On January 12, 1904, while Samuel Maherero was away, violence erupted in Okahandja. Whether it began because settlers and soldiers feared the Herero were planning to take up arms soon, from other misunderstandings, or both, is not completely clear. The violence spread quickly with attacks on farmers and ranchers. Within a very short time, the Herero had gained control of all but the fortified places (and these were under siege) as well as the land and livestock of the German settlers in their territory. The Germans could offer little resistance because Leutwein had taken four of the five companies of the *Shutztruppen*[59] to the south in response to the ongoing problem with the Bondelswartz. Curiously, the Herero did not press their advantage, nor did they pursue the siege of fortifications or try to take Windhoek.

In perhaps the most important lapse, they failed to understand the importance of the railroad for German operations. They had withdrawn and set up a strong defensive position in very rugged terrain north of Okahandja. After the shock of the first wave of attacks wore off, settlers and soldiers began a campaign of brutal reprisal against Africans unfortunate enough to fall into their hands. The uprising became the excuse for beatings, imprisonment, and lynchings, as well as vigilante attacks on isolated and unprotected villages.

The killing of German nationals silenced those critics in Berlin who had questioned the wisdom and cost of imperial holdings, as well as giving Leutwein's critics a bully pulpit for their view that the governor's lenient policies had encouraged the rebellion. Jingoistic nationalism combined with blatant racism (chapter 3) generated a strong sentiment that the Africans had to be taught a lesson in a way that would deter any further possibility of disturbances by making them understand their place in the natural order of the world. Simply summarized, the rebellion provided the pretext and the military resources for the Germans to get what they wanted—the fertile land held by the Herero.

Other factors played a role as well, not the least of which was a perception that the rebellion had challenged Germany's international prestige, honor, and authority. The director of the Colonial Office argued that "Germany's honor demands the repression of the uprising by all means."[60] That a local rebellion in Africa could generate such a high level of outrage and response gives considerable insight into German self-image. Consider that between 1891 and 1910, the contribution from all its colonial holdings made up less than 1 percent of German trade. *The war would cost 600 million marks, with returns from the "colony" able to pay only a fraction of the expenditure.* The total amount of investment by German companies in all of the colonies never exceeded the totals for state subsidies and subventions to maintain German presence and control. In terms of German capital investment as a whole, the African colonies formed an exercise in "conspicuous consumption on a national scale" rather than a valuable national asset.[61] All of the Great Powers (and some countries, like tiny Belgium, who were not) had them—therefore, so should Germany.

FROM GENESIS TO GENOCIDE

Statements about quelling the rebellion quickly illustrated major flaws in planning made by the German General Staff because they, and those in power in Berlin, acted based on ideological preconceptions, not real intelligence about the territory and the opponents. They did not consider local knowledge important because, after all, how much of a problem could "savages" present? First, they presumed they had clear technological superiority. They did, but they also underestimated the weapons and skills of the Herero. Second, assumptions about white superiority totally rejected any idea that an inferior race might have a sophisticated understanding of tactics and the ability to use local knowledge to design an effective plan of resistance. Third, they thought the lessons learned in Europe would translate to Africa. German military culture, formed by the 1866 (Austria) and 1871 (France) wars emphasized the goal of early, "cheap," and decisive victory based on superior technology, mobility, and planning. Unfortunately for the German army, much of the necessary infrastructure, such as railroads, that were essential to their operations based on mobility did not exist. Moreover, the German military did not plan for desert conditions and disease. They had to fight over unfamiliar landscapes and in circumstances that inhibited logistical plans based on European terrain. Almost as many German soldiers died from disease as from death in battle.[62]

Governor Leutwein had consistently counseled against a policy of extermination, but on pragmatic, not humanitarian, grounds. *He saw the African communities as a necessary component of the future economy, providing low-wage workers essential to support German enterprises.* He had thus argued the case for a slow and steady pace and had worked to extend and consolidate German rule by playing divide and gradually dominate as opportunities presented themselves. For Leutwein, without the people and cattle, the colony would have little worth. With the advent of the rebellion, Leutwein received instructions from Berlin that he should immediately undertake military action, and he could not engage in negotiations without the express approval of the kaiser. The only acceptable outcome would be the unconditional surrender of the Herero.

Leutwein had divided his forces into three taskforces. In early March, he sent one east to seal off the border with Bechuanaland (modern Botswana). Over the next two months, losses suffered from fighting and disease reduced the number of men from 534 to 151. Leutwein himself led an expedition against the main Herero force in early April. Only a strategic retreat prevented it from being overrun and annihilated. At this point he decided to discontinue all operations against the Herero and wait for reinforcement.[63] Shortly after, Leutwein received word that the General Staff and the kaiser had replaced him as commander in chief.

Shedding Rivers of Blood and Money[64]

Leutwein's replacement, General Adrian Dietrich Lothar von Trotha, had gained a reputation for ruthlessness in his previous assignment in German East Africa and China. Shortly after his arrival, von Trotha declared martial law, a move that gave him full control without any possibility of interference from Leutwein. Even though Leutwein held a commission in the army, he reported to the Colonial Office and the civilian government. Von Trotha was accountable to a separate chain of command that bypassed the civilian government, going directly to the chief of staff, the Imperial War Cabinet, and the kaiser.[65] Before the wars would end, Germany would send 21,000 soldiers and expend 6 million marks.

From the beginning, von Trotha had a soldier's tunnel vision based on one goal: a complete and speedy suppression of the rebellion. He had no sympathy or use for the Herero, describing them as *unmenschen* (nonhumans, brutes) and, observing that they would only yield to superior force, he said: "I shall destroy the rebellious tribes by shedding rivers of blood and money."[66] At this point, questions surround Maharero's decision to do nothing after the rout of Leutwein in April. Olusoga and Erichsen argue that he underestimated how the Germans would respond, not realizing the perceptions and resulting depth of support for draconian measures generated by the rebellion.[67] As von Trotha deployed his forces, the Herero did nothing to disrupt the operation.

After the battle of Oviumbo, the Herero had gone north, camping at the foot of a large plateau known as Waterberg (water mountain), named for the underground aquifer and many water holes surrounding it. Though not of great height, it forms a stunning landmark with red cliffs rising out of the desert, reminding one of places in Arizona and New Mexico in the United States. Von Trotha considered his resources and options. With the full support of Berlin, he now had an army of 6,000 men—almost twice the number of settlers they were sent to protect. He planned a concentric envelopment that would encircle the camps. The Herero managed to break the German lines deployed in the southeast. This has led to speculation about von Trotha's strategy. Did he leave that quadrant deliberately weak as a tactic designed to let the Herero flee into the desert with little hope of survival or was it merely bad planning? Whether planned or not, the encampments fled through the breach into the inhospitable desert. Against the odds, some Herero—Dreschler puts the number at 1,000, made it to Bechuanaland.[68] This group included Samuel Maherero. The largest number attempted to move west by slipping through German lines in small numbers. German patrols undertook an explicit campaign of annihilation against these groups, killing all that they discovered.

The same conditions that eventually decimated the Herero made pursuit by German forces extremely difficult. Lack of water supplies and provisions caused the Germans to fall back but impacted the Herero even more. Without water, cattle and people died in large numbers from dehydration and starvation. Von Trotha set up patrols to monitor water holes, but the majority of the contingent was assigned to patrol the edge of the desert to cut off routes of escape and access to water. Orders mandated that patrols should take no prisoners. Thirst and malnutrition would accomplish the rest. Another contingent received orders to make a sweep through Hereroland with the directive that any Herero should be shot on sight.[69]

Because the Germans felt that normal rules of European warfare did not apply, the use of flags of truce or offers of negotiation became acceptable ruses to lure and kill those who responded to the offers, not a violation of any standard. Across Hereroland, bands of Herero were tricked into believing it was safe to return from the bush and then killed.[70] More revealing is the proclamation distributed to the Herero issued in October, written in a pidgin form von Trotha thought appropriate for the audience:

> I am the Great General of the Germans. I am sending a word to you Hereros. You who are Hereros are no longer under the Germans. You have stolen, killed, and owe white people . . . You Hereros must now leave this land it belongs to the

> Germans. If you do not do this, I shall remove you with the big gun. A person in German land shall be killed by the gun. I shall not catch women and the sick, but I will chase them after their chiefs or I will kill them with the gun. These are my words to the Herero nation.
>
> The Great General of the Kaiser, Trotha[71]

Von Trotha also offered a bounty for each dead chief. He wrote to Alfred von Schlieffen, chief of the General Staff, "I believe that the nation must be destroyed as such . . . I think it better that the nation perish rather than infect our troops."[72] The proclamation totally ignored the fact that Germany never had possession—the issue *was* gaining possession.

Von Trotha had support from his superiors, the kaiser included. Cooler heads in the Colonial Department pushed for rescinding von Trotha's order because they feared reports of the slaughter would damage Germany's international reputation, a very different take (Christian virtues) from the military version. The General Staff had fully supported von Trotha's policies against Chancellor Bernhard von Bülow's more moderate pragmatic arguments that paralleled those of Leutwein with regard to the potential economic consequences. Civilian concerns about the conduct of the war and the impact on the future viability of the colony had little resonance with military authorities. In the power struggle that followed, the military vision prevailed until it became clear to the chief of the General Staff, von Schlieffen, that von Trotha could not accomplish his mission. At his own request, his civilian superiors granted Leutwein home leave, which left von Trotha in charge. In December 1904, Chancellor von Bülow finally persuaded the kaiser to alter von Trotha's orders in that he should "treat mercifully those Herero who voluntarily surrender."[73]

The Germans began rounding up the remaining Herero and shipping them to prison camps run by the military. A sweep by patrols through Hereroland in September 1905 resulted in the death of 1,000 Herero with 286 more taken prisoner. Some were then sent on to forced labor camps run by private companies or farmers. A military report in 1908 estimated that 45 percent of Herero prisoners in military custody died there.[74]

The Nama Rebellion

Hendrik Witbooi had refused to join the Herero. Instead he had honored his commitment to the Germans by sending fighters to join operations against the Herero. Reports of the brutal tactics and thorough destruction of the Hereros combined with continuing hassles with colonial authorities over lands and rights finally convinced Witbooi that further cooperation would merely ease the path toward total subjugation. Despite their cooperation, the Nama had elicited little respect in return. Paul Rohrbach, the settlement commissioner (1903–1906), stated: "From the point of view of the economy of the country, the Hottentots are generally regarded in the wider sense, as useless, and in this respect, providing no justification for the preservation of this race."[75] Shortly after Trotha's proclamation in October 1904, Witbooi openly declared war. Not all of the Nama tribes joined the rebellion. The Germans captured several of the smaller tribes (Zwartboois, Topnaars, Bondelswartz) in a preemptive strike before they were able to mobilize.[76] Trotha, learning of the outbreak of hostilities, immediately ordered the detention of the Witbooi contingent still serving with the Germans.

In actuality, a mini-rebellion had begun earlier. Jakob Morengo, a survivor of the Bondelswartz uprising, had returned to South-West Africa in early July and begun to raid farms in the south.[77] Perhaps the first official engagement of the Nama rebellion occurred at Kouchanas on August 30, 1904. Over the next few months, Morengo, using hit-and-run guerrilla tactics, embarrassed and demoralized the German contingents in the area. At one point, the kaiser himself had put a 20,000-mark bounty on Morengo's head. Until his death in 1907, he was widely regarded as the most effective rebel leader, gaining the grudging respect of the Germans, who gave him the sobriquet *der schwarze Napoleon* (the black Napoleon).[78]

Witbooi, Cornelius (Frederiks), Morengo, and other leaders knew that they could not prevail in a large-scale set-piece battle. They fully understood the devastating power of modern artillery and machine guns. The tactics adopted were a variant of their old cattle-raiding forays of earlier wars. In each raid against a convoy or farm, they would capture all available weapons, horses, and cattle. They kept the weapons and sold the livestock for provisions and ammunition to continue the fighting.[79] They also had the advantage of knowing the location of water holes. A line from Kipling's *Gunga Din* captures the situation: "But when it comes to slaughter, You will do your work on water, An' you'll lick the bloomin' boots of 'im that's got it." German troops found Kipling's words deadly accurate. Dehydration of both men and animals, the extreme fluctuations of temperatures between noon and midnight (from well over 100 degrees Fahrenheit to just above freezing), and the erose nature of the terrain made operations difficult. Add to this the fact the Germans no longer had the services of the scouts and trackers once provided by the tribes; they lacked local knowledge. The Germans found themselves in the classic dilemma of fighting a war they could not win and could not end by military means.

In April 1905, von Trotha moved his base south to take personal command of operations there. His actions mirrored those directed against the Herero. At this point, his lack of success despite an overwhelming superiority had undermined his standing, both in Berlin as well as with the locals. Two personal tragedies took a toll as well. In June, a favorite nephew, a lieutenant, died in an action against the Bethanie-Nama. Von Trotha's wife, who had stayed in Germany, died shortly after. Just before his departure, von Trotha received news of Witbooi's death. Still, in his last speech before leaving, he plaintively noted: "In this land I have lost everything that was dear to me in life."[80] On his return to Berlin, he was feted and received the highest military honor of the Reich. The personal costs to him pale in comparison with the costs he inflicted on the Herero and Nama. The new civilian governor, Friedrich von Lindequist, had little regard for the rebels, but as a diplomat, he also understood the damage to Germany's international reputation inflicted by von Trotha's tactics. Still, an interesting change of positions occurred, with the soldiers now arguing for much less harsh terms for surrender than proposed by the civilian von Lindequist.

The death of Hendrik Witbooi in November 1905 foreshadowed the end of the rebellion. Witbooi's son, Isaak, had not distinguished himself. He could not automatically step into his father's position and exercise the same authority. Weary of the struggle, several subchiefs parted with Isaak in an effort to begin negotiations. Samuel Isaak (a cousin) led the movement, surrendering in late November 1905. Over the next three months, the rest of the Witboois accepted German terms, culminating with the surrender of Isaak in early February 1906. The rebellion continued in lesser intensity until the surrender of Cornelius Frederiks (Bethanie-Nama) and the death of Morengo in September 1907. The Germans kept very few of the promises made to those who surrendered.

Surrender proved as fortuitous for the Germans as it was disastrous for the tribes. In an interview with a South African newspaper, Morenga had concisely summarized German problems: "[Germans] cannot fight in our country. They do not know where to get water and do not understand guerrilla warfare."[81] The Germans never mastered the problem of effective logistical support in the south, nor of dealing with a mobile, and for the most part invisible, enemy. Support for German troops was scandalously bad, especially with respect to rations and medical care. Morale stood at a very low ebb.

Concentration Camps (*Konzentrationslager*)

After Waterberg, the military had set up five main camps to handle internees: Windhoek, Karibib, Okahandja in the interior, and Swakopmund and Lüderitz (Shark Island) at the two ports on the coast. The camps clearly provided cheap labor, but given the lack of Herrero resistance, the camps served no real military purpose despite the argument that internment deprived the adversary of fighters.[82] Moreover, two-thirds consisted of women and children.[83] Reports state that rape was common in all of the military compounds.

The military camps reflected the nature of the war. Because vengeance played a role, the terms of incarceration, by providing subsistence conditions, ran counter to the goal of providing a healthy workforce. On von Trotha's orders, the male prisoners received only minimal daily rations, women and children half portions. Malnutrition and starvation occurred because the staples provided, rice and flour, had not been part of the Herero diet. They neither knew how to prepare the rations nor often had the appropriate utensils to do so even if they had some idea of what to do. Historians note that internment, particularly at Swakopmund or Shark Island, literally portended death because of inadequate food, clothing, and shelter.[84] Depending on whose estimates you accept, a minimum of *30 percent* of those interned died. Some place the total as high as *50 percent*. Neither attrition nor health problems prevented exploitation of the detainees as forced labor. Senior officials in both Windhoek and Berlin knew of the conditions and chose to do nothing.[85]

The missionaries play an important part in the story of the camps and the "ethnic cleansing" of Hereroland.[86] Von Trotha and the war had reduced the influence of the missionaries to an irrelevant, and for some, an unwanted, presence by separating them from their congregations. Soon after his arrival, von Lindequist contacted the head of the RMS (*Rheinich-evangelische Missionsgesellschaft*) mission, proposing that the missionaries could undertake the task of "peacemaking" by helping to locate and bring in those Herero still in the bush. He provided funds to repair and restore two mission posts as well as food and clothing. He also promised to remove all soldiers from areas around the posts. After some negotiations, the missionaries agreed to participate. Eventually four stations were opened under RMS auspices. They operated for about seven months, with the last being closed in early August 1906. Note that this agreement permitted von Lindequist to transfer these soldiers to the ongoing war in the south. The missionaries used Herero organized in "peace patrols" to find other Herero and persuade them to come to the mission camp. While von Lindequist delivered on the promise of food and clothing, authorities also put pressure on the missionary camps to transfer those Herero who accepted the offer, to surrender them quickly to the military camps or to the privately run work camps. The missionaries felt that they had little power to resist. Oermann concludes that initially the RMS acted laudably but in the end could not prevent many from dying in the camps. He asserts: "The RMS protested against the treatment of the prisoners and made public what happened on Shark Island or Swakopmund, but they did not protest in a forceful manner or to the highest political authority."[87]

Shark Island became known as "Death Island."[88] The Witboois and Benthanie were originally interned at Windhoek and Karibi. When Berthold von Deimling took command, replacing von Trotha, he ordered the transfer of these two tribes to Shark Island in lieu of deporting them. The island had no permanent shelters for those interned. The severe conditions, the malnutrition, and the general unhealthy state of the prisoners made hard work a death sentence. One employer, rather than asking for better care for the prisoners, asked that more be sent from elsewhere.[89] Von Lindequist expressly stated that "perhaps one should wait and see first how the situation will develop and whether the numbers to be deported might be reduced so as to cut down the cost incurred."[90] By January 1907, the workforce was depleted to the point that projects had to be abandoned. The camp was closed in April 1907. The Nama were transported to other camps. Unlike the Herero, the Nama were never released from German custody. Some were deported to Cameroon. These gained their release only in 1915 when British Union troops took over the colony.

THE PEACE OF THE GRAVEYARD: "WITHOUT CATTLE, THE HERERO HAVE NO USE FOR THE LAND"[91]

With the principal tribes destroyed and most of the remaining members interned, the Germans could do as they wished without significant opposition. Successive imperial proclamations announced the formal expropriation of the land and annulment of any rights previous occupants may have had. In this, a curious concern for the status of the agreements that established the reserves, as well as for the possible implications of abrogating the treaties of protection, emerged. Given circumstances, these concerns seem no more than a formal exercise in making sure justifications covered all the possible objections from the anticolonial factions in the *Reichstag*. This might have been the case because the course of the war had raised concerns about the treatment of the Herero among the Social Democrats in the *Reichstag* who opposed imperial expansion. The January 1907 elections in Germany (the Hottentot elections) became a referendum on German policy in South-West Africa.[92] The Social Democrats suffered a defeat that considerably dampened their criticisms.

New regulations barred the indigenous populations (with some exceptions) from owning land or raising cattle. The regulations kept them in a permanent state of absolute poverty without rights. They became a permanent underclass, a source of unskilled labor with no hope of better expectations—the modern equivalent of the Spartan helots, subjected, faceless, and totally replaceable at will. The irony is that the policies produced a labor force insufficient to fill demand in terms of both numbers and needed skills. This generated a call for foreign migrant labor that failed to attract sufficient numbers because of competition from other colonies and the realpolitik that applied to colonies as part of the larger political game among European powers.

Legislation barred mixed-race marriages (1907). A High Court (Windhoek) ruling annulled all mixed marriages, while other legislation severely curtailed the rights of white settlers who maintained relationships with African women. No matter how long married or how many children, settlers with mixed-race families “were expected to abandon them in the name of racial purity. Those who refused were banished socially and economically from white colonial society.”[93] Olusoga and Erichsen assert that the critical issue involved the status of mixed-race children, not that of mixed-race couples. Under German nationality law of the time, children of German fathers automatically acquired German citizenship. Officials wished to prevent the progeny of mixed relationships from doing so. The presiding judge in the High Court case had ruled that once a bloodline had been “contaminated” with black blood, nothing could change the status of subsequent generations.[94] The debates surrounding the adoption of these laws and subsequent attempts to pass similar legislation in Berlin give considerable insight into attitudes of the time. More importantly, they set the stage for renewal of older debates about the role of Jews in German society. South Africa occupied the colony in 1915 after defeating the German force during World War I and administered it from 1919 until it gained full independence in 1990.

CHAPTER 5

The Armenian Genocide

> The relatively low impact of the genocidal killing of one million Armenians on modern public consciousness raises serious questions about the ability of the international community to prevent or punish acts of genocide.
>
> —Vahakn Dadrian[1]

PERSPECTIVE

On March 15, 1921, in Berlin, a young Armenian refugee named Soghomon Tehlirian shot and killed Memhed Talât Paşa (pasha), the last grand vizier (prime minister) of the Ottoman Empire. Talât, when serving as minister of the interior (1915), had ordered the roundup and arrest of leaders of Armenian organizations in Constantinople and initiated the process that resulted in the mass deportation and killing of Armenians over the next three years. Before his assassination, Talât had been convicted and sentenced to death in absentia in the Turkish courts-martial of 1919–1920 for his crimes against the Armenians and other minorities.[2] A German court found Tehlirian not guilty on the grounds of temporary insanity caused by the trauma of his life.[3] The massacre of the Armenians, and the assassination, made a lasting impression on a young law student named Raphael Lemkin.

The Armenian story forms part of a broader Turkish policy aimed at all Christian minorities in the wake of the Balkan Wars (1912–1913) that finally ended Ottoman rule in Eastern Europe after five centuries. In addition to Armenians, Greeks, Kurds, and Assyrians were also targeted. While the term "ethnic cleansing" appeared prominently with regard to events in the former Yugoslavia in the 1990s, the actions of the Turkish government between 1914 and 1923 in expelling "undesirable populations" to create a more ethnically homogenous state stands out as an earlier 20th-century example, as does the expulsion of Muslims from former Ottoman territories.[4]

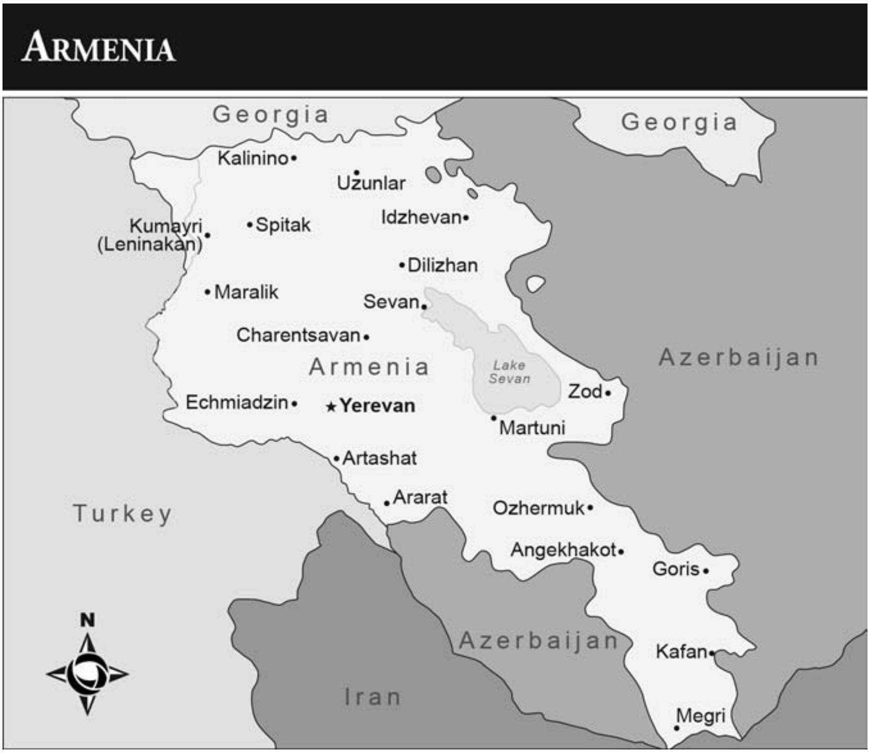
The discussion at the beginning of chapter 4 uses the term "amnesia" to describe the aftermath of the Herero genocide. Vahakn Dadrian, writing in 1989, argues that, for the international community, the term accurately describes the aftermath of the Armenian case as well, even though 100 years later the memories still burn brightly in the memory of descendants in the way that the Holocaust in Germany affected Jews everywhere. It applies with respect to the other minority groups, Assyrians, Kurds, and Greeks, who were targeted as well. Their story becomes secondary to that of the Armenians. It also points to a slightly different set of issues in terms of "amnesia"—outright denial. Various estimates put the death toll in Armenia at 1–1.5 million, with the Greek population suffering almost as many.[5] Because of the attention generated at the time, and the activities of Armenian communities around the world, the Armenian genocide has usually served as the defining case that precedes the Holocaust in Nazi Germany.

The Armenian case does play a special role in the evolution of international awareness about genocide. As noted earlier (chapter 1), the events in Turkey and the lack of international action combined with the policies and practices of Nazi Germany sparked the crusade of Raphael Lemkin to inform people and generated the impetus for the 1948 Genocide Convention. On the downside, the promise of the convention obviously did not translate into effective action by the international community. Moreover, despite the vast amount of evidence that includes an admission by Talât Paşa that it happened, plus eyewitness accounts, official archives, photographic evidence, the reports of diplomats, and the testimony of survivors, successive regimes in Turkey have denied what occurred.[6] The *New York Times* has noted that "the Turkish government considers even discussion of the issue to be a grave national insult, and reacts to it with hysteria."[7]

CHRISTIANITY, ISLAM, AND THE OTTOMAN EMPIRE

Historically, as with many Middle and Near Eastern territories, Armenia describes a broad geographical area as well as an ethnic group (see Map 5.1). During the early part of the first century BC, Tigranes II (the Great) had built a substantial empire that comprised territory that ran from eastern Anatolia to the Caspian Sea. As a consequence of the Third Mithradatic War, which Rome fought against Pontus (73–63 BC), the territory controlled by Tigranes, along with most of that subject to Mithradates, became Roman provinces.[8] According to the official history of the Armenian Apostolic Church, two disciples of Jesus, Thaddeus (Nathaniel) and Bartholomew, first brought Christianity to the kingdom of Armenia in the first century AD. The Armenian kingdom adopted Christianity as the official national religion in 301 AD, becoming the first nation to do so.[9]

Map 5.1


ARMENIA
Georgia
Georgia
Kalinino
Uzunlar
Idzhevan
Kumayri
(Leninakan)
Spitak
Dilizhan
Maralik
Sevan
Charentsavan
Armenia
Lake
Sevan
Azerbaijan
Zod
Echmiadzin
Yerevan
Martuni
Artashat
Ararat
Turkey
Ozhermuk
Angekhakot
Goris
N
Azerbaijan
Kafan
Iran
Megri

The first Turkish invasion of the Armenian homeland occurred in the 11th century AD, although the Ottomans did not gain total control of Cilicia until late in the 14th century (1376 AD). But not until the conquest of Constantinople by Sultan Mehmed II in 1453 did a large number of Christians become subject to Ottoman rule. By this date, Constantinople had evolved into the center of the Orthodox Christian world.[10] As the empire expanded into Europe, more and more non-Muslims came under Ottoman authority. *Christians constituted the greatest proportion of the population in Ottoman-controlled territory in the Balkans.*

The failure of the Siege of Vienna in 1529 foreshadowed the end of Ottoman expansion into central Europe. One hundred fifty years of struggle followed, culminating in the Battle of Vienna in 1683, when Ottoman forces again came close to capturing the city. The Ottoman defeat marked an important turning point in the almost 300-year struggle between European kingdoms and the challenges posed by the Ottomans in Eastern and Southern Europe. Over the years following the battle, the Habsburgs of Austria, with the help of Poland, Russia, and Venice, gradually occupied and gained control of southern Hungary and Transylvania. Struggles between the Habsburgs and the Turks would continue throughout the

18th century without major territorial gains or losses for either side. Russia, the self-presumed successor to the Byzantine legacy as guardian of the Orthodox Church, became a persistent threat during the 18th century, even though major adjustments in territory subject to Ottoman control would not occur for another 80 years.

THE OTTOMAN SYSTEM OF GOVERNANCE

Albert Hourani describes the Ottoman Empire as a religiously, ethnically, and linguistically diverse "bureaucratic state, holding different regions within a single administrative and fiscal system" (see Table 5.1).[11] Its foundation rested on three basic institutions: Islam, the power and position of the sultan/caliph, and the professional military. From this perspective, note the powerful pull the empire had as the expression of the unity of Islam. Islam as a faith permeated the social and political fabric of the Ottoman system. Consider as a European parallel the influence of the Roman Empire as the ideal of Christian unity exemplified by the Roman Catholic papacy as well as in secular governance by the Holy Roman emperor. In the Ottoman Empire, the sultan embodied both the sacred and the secular.

The early Ottomans had embraced the "most broad-minded traditions" of Sunni Islam.[12] The sultan had religious authority because, as "caliph," he served and acted as Allah's agent in the world for the *ummah*, the body of believers.[13] As such, the preservation and expansion of Islam, and overseeing the administration of Islamic law (*shari'a*), formed his first duty, but justice and security for his subjects presumably flowed from his wealth, well-being, and control of the military. The empire controlled the holy cities of Mecca and Medina and actively promoted, organized, and provided security for the obligatory pilgrimages of the faithful as part of their obligations. Still, there was a sharp division between rulers (*askerî*), who paid no taxes, and the ruled (*re'aya*/flock). Pragmatism dictated that the rulers went to great lengths to ensure the cooperation of the *re'aya*, whose taxes were the main source of government revenue. The Christian parallel of the shepherd tending his flock captures the essence of the presumed relationship.[14]

Table 5.1

The Ottoman *Nizam*

The Ottoman *nizam* (system of rule/order) consisted of two major divisions: the *askerî* and the *re'aya* (tax payers). The *askerî* comprised the "*seyfiye* (men of the sword), *kalemiye* (men of the pen/bureaucracy), and *ilmiye* (men of learning), all of whom were exempt from taxation. The title of *Paşa* (pasha) signifies a high ranking official such as a governor or a general. In Turkish names, the title comes last. As an individual rose in rank, the honorific would change, so Ismail Enver rises from Enver Bey to Enver Paşa.

Halil Inalcík speaks of the triumph of conservative fanaticism in the mid-16th century.[15] Early sultans had embraced mathematics, logic, and science as important to correct (rational) thinking and as a means to ascertain divine truth. On the other hand, within Ottoman society there had always existed a group of fanatical *ulema* (legal scholars) who regarded the intellectual sciences (and music, dancing, and poetry) as sacrilegious. Many of these preached and taught in the mosques and had gained a popular following. The issues eventually revolved around "innovation." Strict traditionalists refused to accept that changes in circumstances might require changes in laws and practices.[16] While religious opposition to innovation explains part of the problem the empire had in dealing with Europe, other factors, such as the political power of entrenched interests, played a role as well.

The Millet System

Discussions of Ottoman governance usually focus on the "millet system." As with many terms, "millet" has a number of different meanings: religion/rite, community, or nation, depending on context.[17] Used to describe the basis of the Ottoman system of governance, the millet system formed

> a political organization which granted to the non-Muslims the right to organize into communities possessing certain delegated powers, under their own ecclesiastical heads. In time such "communities" or millets developed their own peculiar characteristics and traditions . . . becoming identified with the various nationalities. Hence the Orthodox Church in Turkey was in a sense, transformed into a political institution and became identified with the Greek nationality.[18]

The institutional form, the millet, preceded Turkish conquest. The Ottomans adopted it as an expedient measure, rather than attempting to impose another set of institutions that might have caused opposition and disruption in extracting taxes and ensuring the acquiescence of their new subjects.[19]

The key to understanding how the system worked rests on two important principles. First, the shari'a, the moral code and religious law of Islam, did not apply to nonbelievers. It governed only the faithful (*ummah*). Second, because of this restriction, the legal system operated on a *personal* basis; that is, an individual's ethnoreligious identity determined the law to which he or she would be subject. Western legal systems all have the common assumption that, unless specifically legislated, the legal system applies to everyone within the *territorial* jurisdiction of the legislative authority. Instead, within the Ottoman Empire, legal obligations flowed from *who* you were in terms of religious affiliations, not *where* you were.

A Christian, Jew, and Muslim living in the same household would not be bound by a unified Ottoman legal code, but each would be subject to the laws and practices of their respective millets and judged by courts and officials responsible for enforcing those laws.[20] Each millet selected their own leader, who then had the responsibility to oversee the collection of taxes and make the necessary arrangements to enforce the appropriate law. The Ottoman military only had responsibility for external threats. Millets had the responsibility of "policing" themselves.

The semiautonomy of the Christian and Jewish millets did not translate into equality with Muslim subjects, but neither did it result in overt oppression or persecution. Davison notes: "Neither the concept nor the practice of citizenship, involving equal rights and duties, existed in the Ottoman Empire before the nineteenth century."[21] Christians and Jews could not serve in the armed forces or in any high administrative post; nor could they engage in any activity that could be considering as proselytization. Non-Muslims had to pay a personal tax (*jizya*) in return for their protection and as a demonstration of their fealty.

Still, until the end of the 18th century, the Ottomans embraced a policy of toleration not found in their Western European contemporaries. The 19th century would become a different story as not only Ottoman governors but all of Europe struggled with the implications of the new ideas about the proper relationship between governments and those governed unleashed by the French Revolution as well as with the changes wrought by the Industrial Revolution.

DOMINANCE AND DETERIORATION

M. Şükrü Hanioğlu and Albert Hourani argue that many of the usual explanations for the eventual disintegration of the Ottoman Empire draw on simple ideas that gloss over the complex nature of the changes over time that inhibited the Ottomans from effectively rising to the challenges posed by rapidly modernizing European states.[22] Simplistic explanations downplay the strength of motives that have little to do with religion. In particular, they note that the ideas of decline and decay are very difficult to apply. These imply a comparison with some ideal prior time when institutions worked as the person writing thinks they ought to work. As terms, "decline" and "decay" epitomize the essence of romantic conservatism, which generally argues that change has eroded values important to the maintenance of a healthy society. By the end of the 18th century, the Ottoman dynasty had existed for 500 years and had controlled a good part of North Africa and the Middle East for 300 years. The Ottoman elite were quite aware that the "traditions of the near-eastern state" were outdated and actually inhibited initiatives to modernize.[23] In the end, dealing with the necessity of change, both from internal devolution, conservative internal forces opposed to reform, and from external forces that generated challenges to existing practices and governance proved too complex and daunting.

While religion plays an important part, the issues associated with the eventual disappearance of the empire have never reduced to a simple scenario of reforming secularists against religionist purists. A decline in the ability of the central government to assert effective authority over certain regions, a substantial decline in the economic base of the empire, the developing interests of emerging European Great Powers, the inability to modernize institutions in a timely fashion, and ideas of identity and self-governance (after the French Revolution) all played a part in the eventual demise of Ottoman rule. Many changes challenged fundamental beliefs about how society ought to be organized. In all of this, one must keep in mind a simple sociological fact of life: real change requires a basic alteration in the mind-set of many people. Without this, simple decrees and mimicry of forms will lack the underpinning to promote and sustain change.

Given distance and problems of access, Constantinople had always found it difficult to assert effective direct control over all areas nominally under Ottoman authority. Over time, a devolution from central control occurred as local elites emerged who governed according to their own policies rather than following directives from the center, even to the extent of maintaining their own military. Yet even the strongest of the local rulers chose to remain within the Ottoman system. Hourani characterizes them as "local Ottomans," not independent sovereigns.[24] These local rulers faced much the same problems as the central government. Their power did not extend all that far out from the seats of government either. Efforts to strengthen central control failed because the central government increasingly lacked adequate military and fiscal power to enforce decrees intended to reverse the trends.

A second internal change occurred as important institutions such as the Janissaries (professional army), originally devised to be apart from the corrupting influence of society, became enmeshed as merchants, traders, and an important part of local governing authorities. By doing so, they developed an abiding interest in protecting their positions, resisting any initiative that might threaten the basis of their internal political influence. Combined with the religious attitude toward "innovation," this had an enormous impact on the ability of the Turkish military to adapt to the challenges posed by the increasing technological and tactical superiority of their Western European adversaries. The Janissaries resisted change because it would institute "infidel practices."[25] They did not represent an isolated group. Major reforms challenged many entrenched interests that had a stake in resisting any change perceived as having a negative impact on their position.

The decline of central power resulted in a third problem. It negatively impacted the ability to assess and collect taxes. During the 18th century, tax revenue increased by only 10 percent while prices quadrupled. Trade deficits and ineffective policies to combat the outflow added to economic woes, as did the costs of war. Costs included more than the mounting burden of direct expenses for men and materiel. For example, the Russo-Turkish War (1768–1774) resulted in the loss of productive territory (the southern Ukraine, and eventually Crimea in 1783). An indemnity payment to Russia took 50 percent of state revenues in 1775.[26] Temporary taxes to pay for war expenditures turned into permanent levies.

In addition, Ottoman governments had lost the capacity to deal with a growing trade deficit. Corruption, declining production, and inferior goods, combined with preferential tax rates for foreign traders, had produced a situation where much of foreign trade had fallen under control of foreign merchants. The central government attempted to redress the situation through a series of reform measures that placed all merchants, regardless of nationality or religion, under the same set of regulations. However, the underlying weakness stemming from the inability to respond to the challenges posed by industrialization meant the reforms had little overall effect.[27] Add to this the loss of European markets because goods produced there or in areas under European control had replaced those from the Middle East. In addition, European products were slowly gaining a foothold within the empire. The important fact was not the loss of European markets but rather what the change in the nature of trade symbolized. With regard to Europe, the countries in the Middle East were becoming mainly suppliers of raw materials and buyers of finished products, another indicator of failure to adapt to changing circumstances.

Diplomacy and Disaster

By the mid-18th century, Ottoman diplomacy had accepted that the future of the empire required full participation in the European diplomatic arena. Complications arose because many Europeans had an extremely negative perception of the Ottomans as barbarians who oppressed Christians. Negotiating a strategic partnership with a European power usually meant that any agreement came with strings attached in the form of demands for administrative reform aimed at improving the status of the empire's Christian subjects. The last part of the century witnessed dramatic advances in European science and technology that permitted a rapid accumulation of wealth and resources by states that had embraced the Industrial Revolution, further eroding the ability of the empire to resist such demands because of its declining economic base. The ideas of nationalism and equality flowing from the French Revolution compounded the difficulties for an empire already beset by an ethnically and religiously diverse society dominated by a Muslim majority, a weakness of central control, and severe socioeconomic problems.

If one looks for a critical turning point in the relationship between West and East, the treaty of Küçük Kaynarca in 1774, ending the Russo-Turkish War (1768–1774), stands as the significant watershed event.[28] It ended Ottoman control of the Black Sea and provided a diplomatic basis for future Russian intervention in the internal affairs of the Ottoman Empire. The treaty contained a clause that gave Russia the right to represent the interests of Greek Orthodox Christians in Moldavia, Wallachia, and the Aegean Islands. In the future, Russia would freely interpret and employ this provision to justify its claims to exercise a right to "protect" Greek Orthodox Christians anywhere in the Ottoman Empire. As discussed earlier, the treaty saddled the empire with an enormous debt because of the indemnity owed Russia. Equally important, it signaled the impotence of the Ottomans in resisting the expansionist ambitions of Russia. Nineteenth-century European diplomacy would witness a number of interesting moves *vis à vis* the Ottoman Empire as it became more of a pawn than an important player in the broader struggle for power and position in Europe.

During the 19th century, an imperial racism that assumed that a superior civilization had a right and duty to spread enlightenment and progress among the less civilized justified European colonial expansion as well as intervention on behalf of those oppressed by less enlightened governments.[29] In undertaking actual interventions, or in rhetorical calls for the Ottomans to guarantee equal rights to various religious minorities, European states overlooked the inconvenient fact that neither full equality before the law for all, nor unqualified religious freedom, existed within their own domains. Such actions also disregarded the appalling treatment of indigenous inhabitants in their own colonies. Yet, Europeans claimed a right to intervene militarily when the "barbaric" Ottomans repressed insurrections using the same methods that European states systematically used in their own colonies. The inability to deter or check European imperial expansion into North Africa slowly led to the loss of Ottoman African holdings there.

The "Eastern Question"—that is, the fate of the Balkan holdings of the Ottomans—formed one of the principal concerns of European diplomacy until World War I. Great Britain and Austria (and to a lesser extent, Prussia) wished to prevent the area from falling under Russian control as the ability of Constantinople to govern the area effectively steadily eroded. In the early part of the century, the Napoleonic Wars occupied the Great Powers. The threat of a joint Franco-Russian assault on the empire vanished when Napoleon invaded Russia in 1812. The Serbian (1804–1815, 1833) and Greek (1821–1830, 1832) revolutions began a slow process that would see the empire dismantled piece by piece over the next 90 years. By the middle of the 19th century, the sobriquet "the sick man of Europe" had become a common description. In the Crimean War (1853–1856), Britain and France allied with Turkey against Russia. The Treaty of Paris (1856), in essence, formally added Turkey as a legally recognized European state by guaranteeing its independence and territorial integrity but at the cost of losing Wallachia and Moldavia. The treaty sought to check Russian ambitions, but it had limited impact. It did not deter the French from intervening in Syria (1860). The Treaty of Berlin (1878) would result in cession of one-third of the empire's remaining territory. By the outbreak of World War I in 1914, the Ottoman government still nominally controlled lands from the Aegean to the Persian Gulf and southeast along the Red Sea to Mecca, but its European presence consisted only of the area around Constantinople and south along the Dardanelles.

Internal Reforms and Resistance

Reforms based on ideas borrowed from the West generated many of the issues that led to increased unrest and internal instability. Despite their inability to wage war successfully against more modern armies, the Janissaries still resisted change. In 1807, they forced the abdication of Sultan Selim III, who had begun a series of reforms that included a new army based on Western models. Events over the next year resulted in the removal of Selim's successor, Mustafa IV, the murder of Selim, and the ascension of his cousin, Mahmud II, to the throne. Mahmud II and his grand vizier (Alemdar Mustafa) reinstituted the reforms, including reestablishing the new army. The Janissaries again rebelled and prevailed in an extremely bloody struggle. Mahmud II survived, biding his time for almost 20 years. Taking advantage of a change in opinion caused by the military successes of Mehmed Ali (Muhammad Ali), the viceroy of Egypt, the sultan established a new army corps. The Janissaries again revolted (1826), but this time the sultan obtained a *fatwā* declaring a holy war against them. Their defeat enabled the sultan to take steps to abolish the institution and dismantle other groups associated with it.

> The destruction of the rebellious Janissary corps . . . destroyed the delicate centuries-old balance of power within the Ottoman political system. The Janissaries had served as traditional power brokers with the capacity to make or break a sultan . . . With the Janissaries gone, the ulema lost a main source of leverage over the court and the bureaucracy . . . Henceforth, until 1908, Ottoman politics was reduced to a game played by two major actors: the bureaucracy of the Sublime Porte and the court of the sultan.[30]

On the downside, after the death of Mahmud II in 1839, a series of weak sultans left real power with the bureaucracy over the next 30 years.

The Tanzimat Reforms

In Turkish, *tanzimat* means "reorganization."[31] The Tanzimat reform period applies to the era from the Rose Chamber Edict in November 1839 until the adoption of the Midhat Constitution in 1876. The new sultan, Abdülmecid, supported political and economic reform based in part on models from abroad. The policy reformed taxation and property rights with an eye toward abolishing the distinction between Muslims and other subjects. The original edict had no status as legislation but rather served as a notice of intent to various audiences, both domestic and foreign. A second decree in 1856 reaffirmed the principles of the first but "went considerably further in its rhetoric of inter-religious equality and secularization and its view of a new form of inclusive common identity."[32] The reactions to implementation of the reforms, and the dislocations caused by them, play major factors in explaining the events that led to the massacres that took place later in the century, and the atrocities before, during, and after World War I.

A complete explanation necessitates adding one last factor at this point. As the ideas of national identity and nationalism spawned by the French Revolution spread, movements for self-determination and independence from Turkish rule sprung up throughout Eastern and Southern Europe. The ideas also appealed to many members of the Muslim intellectual community. If fundamentalists could find justification in a romantic interpretation of the past, a new wave of romantic imagination created a vision of the future where a strong Turkish *nation* would emerge from the ruins of a decadent empire. The key problem was the fact that the vision of building a strong Turkish nation had to compete with other ethnic and religious nationalisms that posed opposing and incompatible views of the future, as well as with the romantic vision of the Islamic traditionalists that had dominated for 200 years. As nationalist sentiments evolved among various ethnic and religious groups, fueled in part by the reform movement, they began to aggressively assert their cases domestically while seeking support for their grievances from sympathetic supporters outside the empire.

The reforms when enacted into law signaled a radical change in the organizational principles of the state. The change from a structure legitimized by Islamic law and practice to one based on a different set of principles that made one set of secular laws apply to all abolished the millet system and established a civil court system. Rather than being allowed to rule themselves according to their own internal rules, all religious groups were now subject to a uniform code of secular laws. Fundamentally, the reform movement sought to replace individual ethnoreligious identities with an Ottoman national identity. The new regime sought to deal with the possibility of Christian secession by creating a loyalty to the state that would transcend and subsume other identities and loyalties.[33] The goal was to build a state founded on the assumption of social cohesion and homogeneity as the necessary price and prerequisite for genuine independence and acceptance within a Western-dominated international system.

Reform, in any context, faces a difficult path. The premise that the status and benefits of the new equality would offset or override existing interests instead proved thoroughly disruptive in practice. The reforms greatly increased religious tensions. The new laws upset Muslims because they enshrined interreligious equality. Non-Muslim clerics also viewed the new laws as a threat to their own position because it reduced the scope of their authority over their congregations. Instead of welcoming the dissolution of inequalities, many desired to retain the millet system.[34] Note that the transition to civil authority did not ever result in the complete abolition of the shari'a courts. These continued to exist, although with diminishing impact, until the end of the empire. Despite secular reforms, Islam remained a fundamental structural element in the life of the empire.

In sum, the reforms aimed at creating a more cohesive loyalty to Ottoman rule by erasing inequalities instead solidified and widened existing divisions while fostering open hostility between groups. Ironically, reform served as the catalyst that fostered a deeper group consciousness among the diverse communities in the empire based on a collective sense of grievance. Davison concludes that "the sort of Ottoman equality at which the Tanzimat statesmen aimed, though it had never been given a full and fair trial, was discredited as an idea both among Muslims and among Christians."[35]

Diplomacy and Domestic Reforms

Hanioğlu maintains that Europe never fully comprehended the problems faced by Ottoman reformers.[36] The Treaty of Paris at the end of the Crimean War guaranteed the territorial integrity of the empire. In reality, this meant little because the forces working toward dissolution effectively nullified attempts to reassert central control by Constantinople. During the last 50 years of Ottoman rule, the tensions between the desire of the governors in Istanbul to build a strong Turkish state and aspirations that generated demands for increased autonomy, if not complete self-determination by various groups, set the stage for a number of violent clashes. Religious differences added an explosive component. International scrutiny combined with the vagaries of European diplomatic maneuvering during the second half of the 19th century placed the Ottomans in a very difficult position.

While the reforms served to gain international credibility with European elites, *on the negative side, the idea of equality proved divisive in an era where the ideology of nationalism fed separatist ambitions of those groups who felt long oppressed by others.* The disturbances flowing from the reforms in concert with the complaints and ever more strident demands for concessions from minorities, many of whom played to foreign sympathizers, competed with the more positive perceptions produced by the reforms. Using the Armenians as an example, Bloxham summarizes the situation:

> The Armenian question was dragged into international debate to the distress of the Ottomans . . . Furthermore, over the ensuing years, unrequited Armenian grievances and aspirations would increasing be expressed not through the traditional Armenian hierarchy or through ecumenical political institutions, but through nationalist parties. Their very existence intensified Abdülhamid's paranoia of imperial collapse.[37]

Difficulties arose from the disparity between what the various domestic players expected to gain by courting international support and the limited objectives of those courted. No European power had any interest in seeing a rejuvenated Turkish Empire emerge as a major player on the international scene.

In the 20 years after the Treaty of Paris, three instances of sectarian violence that involved large-scale indiscriminate killing foreshadowed the future. The resolution of each also formed a major step in the erosion of Ottoman authority. In Lebanon-Syria (1858–1860) clashes between the Druze and Maronite Christians resulted in a number of massacres as well as a refugee/displaced population of some magnitude. A revolt of the Christian population in Crete (1866–1869) was complicated by large numbers of "volunteers" who sought to force a union with Greece. Additionally, taking advantage of the situation, the Greek government attempted to incite insurrections in Epirus, Thessaly, and Macedonia—regions still under Ottoman rule.[38] The last incident, termed the "Bulgarian Horrors" by William Gladstone, formed part of a broader pattern of rebellion in Ottoman holdings in the Balkans. The tactics of the regular Ottoman army in suppressing the uprising again raised the issue of the "barbaric" nature of Ottoman rule among many in Europe.[39]

European attitudes put the Ottoman regime in a "no-win" situation. In a note to the French government, the foreign minister during the Cretan crisis, Mehmet Fu'ad Paşa, pointedly stated that on the advice of the Europeans, the Ottoman army had avoided bloodshed because if they had put down the rebellion, the Europeans would have accused the Ottomans of barbarism.[40] The statement specifically cited the "civilized" Russian response to the 1863–1864 Polish uprising where troops had brutally suppressed the rebellion.

The Midhat Constitution and Treaty of Berlin

As the problems in Eastern Europe progressed, those opposed to the pace and direction of reform managed to depose the sultan, Abdülaziz I (1861), in May 1876. His successor, Murad V, held office for only three months before being replaced by Abdülhamid II (1876). Pro-reformers had pushed for adoption of a constitution as a means of reducing Western interference in Ottoman internal affairs. A constitutional commission led by Ahmed Şefik Midhat Paşa drafted a document that the new sultan reluctantly promulgated in late December 1876.[41] The first-ever elections were then held in January–March of 1877. Given the context and the predisposition of European elites to discount heavily any announced Ottoman reform initiative, this was seen as an exercise in diversion, not an initiative that meant real reform.

The 1878 Congress of Berlin was the last meeting in the series of consultations dubbed the "Concert of Europe" by historians, which had begun with the Vienna settlement (1815) in the aftermath of the Napoleonic Wars. The conditions that had produced the consultations associated with the Concert of Europe had changed dramatically. As one diplomatic historian summarized the era, for the first 50 years of the 19th century the Great Powers had feared themselves because of the impact of the ideas unleashed by the French Revolution on their own domestic stability; for the second 50 years they again feared each other.[42] The change in power configuration had several implications. It did not change the continued pressure on the empire for reform, but it diminished the chances of outside intervention because an action independent of a collective agreement had become too risky.[43]

The Treaty of Berlin attempted to construct a permanent solution to the Eastern Question. The treaty also signified an important divide in terms of European regard for Turkish sovereignty, as well as a major change in the attitude of Turkish political elites with respect to cooperation with Europe. The treaty sought to avoid past mistakes. In this goal, it failed. Perhaps arguing that it magnified them instead overstates the case, but at the very least, the settlement contained the seeds of future conflicts that would bedevil European diplomacy through World War I. European policy makers now asserted an absolute right to intervene if the Ottoman government did not treat its Christian subjects fairly. The change did not result in any such direct interventions. More importantly, the treaty clearly ended the pretense that defending the territorial integrity of the empire formed an important interest for any European power. European states now took advantage of the military weakness of the Ottomans to seize lands considered strategic for economic or military reasons. The French occupied Tunisia (1881); the British, Egypt (1882); and the Italians, Eritrea (1885). The eventual outcome of the Bulgarian crisis—European acceptance of Bulgarian claims to Eastern Rumelia without any consultation with Constantinople—strengthened the sultan's resolve to resist future claims.[44]

The loss of most of the empire's Balkan possessions meant that Muslims now formed the majority among the remaining population. The shift essentially meant that liberal reform measures involving concessions to non-Muslim communities no longer had any importance or priority. More importantly, the sultan used his position to enhance his standing as a defender of Islam, utilizing the idea of Turkish nationalism as a pan-Islamic idea to draw others to identify themselves with the ambitions of the Turkish ethnic group. The new vision carried within it the justifications for policies that supported and advanced that goal. *It also carried rationalizations for dealing harshly with those who did not support and embrace it*. The focus on Armenians and Christians often deflects attention from the evolution of nationalist sentiments among other ethnic Muslim communities. Islam might have potentially provided the focus for a national identity that transcended ethnic and linguistic differences, but Kurds, Albanians, and Arabs had little desire to buy into "Turkism."[45] Not just the Armenian and Christian communities but also resistant Muslim communities faced harsh reprisals as well.

THE CLASH OF EVOLVING AND CONFLICTING NATIONAL IDENTITIES

In any movement, the few often drag the many, willing or not, with them. The Armenians had genuine grievances concerning taxation, safety, and security that, despite repeated petitions, the central administration in Constantinople had not addressed.[46] Kurds (adherents of Sunni Islam) had assumed a dominant position in historic Armenian lands, which they had used to exact economic and other concessions. Central authorities had done nothing to address the problem of double taxation—Armenians were forced to pay both Constantinople and the local Kurd chieftains and were required to house Kurdish troops. Crimes against Armenians by Kurds or other Muslims went unpunished. During the Russo-Turkish War of 1877–1878, Kurdish regiments and irregulars had used the events surrounding the conflict to murder 5,000 to 6,000 Armenians. After the war, authorities in Constantinople encouraged Muslim refugees from the new Balkan states and the Caucasus to settle in Armenian territories in eastern Anatolia.

Donald Quataert asserts that after 1878, the idea of an Ottoman citizenship no longer constituted a political option that Ottoman Christian *elites* seriously considered. Instead, in the final decades of the 19th century, they would seek autonomy or self-determination.[47] However, in adopting this stance, Christian populations in the empire took the wrong lesson from the Balkan uprisings and Russian response. They came to believe that the insurrectionary formula of the Bulgarians that had led to the intervention of Russia, and to the eventual recognition of the autonomy/independence of Bulgaria and other Balkan states at the Congress of Berlin, could work in their particular case(s) as well.[48] This misperception, in conjunction with the activist program of the *few*, would produce dire consequences, not only for the Armenian *many* but for other minorities who sought an independent voice.[49]

Armenian Activism

In the period immediately after the second Congress of Berlin, three important Armenian political parties emerged: the Armenakan Party (1885), the Hunchak (Hnchak) Party (1887), and the Armenian Revolutionary Federation (ARF/Dashnaktsutuin, 1890).[50] The three parties drew their platform principles from social-democratic revolutionary theory. The Armenakan Party operated primarily as an underground organization. The Armenakan platform initially differed from that of the Hunchaks and ARF in that it espoused guerilla warfare rather than terrorism, demonstrations, direct confrontation, and promotion of open insurrection as the path to independence. In the beginning, the ARF and the Hunchaks also differed in that the ARF sought autonomy under Ottoman rule while the Hunchaks aimed for an independent socialist Armenian state.[51] In the early 1890s, the Hunchak Party was the most active in terms of sponsoring demonstrations and fomenting insurrection.

Ironically, the Kurds emerged as an important element of Ottoman strategy in countering Armenian aspirations. In a classic "divide and rule" strategy, the sultan actively recruited Kurds into the *Hamidye*, special army (cavalry) regiments directly under his command.[52] The creation had a threefold purpose: (1) dealing with what the Ottoman elite saw as a major potential threat from Armenian activism, and (2) transforming another potentially disruptive ethnic group from potential challenger to a defender of the state, while (3) insulating both Armenians and Kurds from Russian influence.[53] As with many policy initiatives, this one produced unintended consequences in that it also raised and promoted a national consciousness among the Kurds that would eventually result in violent clashes with their Turkish governors that persist to the present day.

In the early 1890s, members of the Hunchak Party attempted to organize a revolt in the Sasun (Sassoun) region (Lake Van area). Beginning in 1893, a refusal to pay central taxes unless authorities took action to remedy their complaints about lack of protection resulted in a number of confrontations and deaths. Local authorities encouraged the *Hamidiye* to attack and kill without regard to state of health, age, or sex. When the Kurds failed to prevail, the sultan sent a large contingent of regular troops who followed the same formula. The British vice consul in Van, C. M. Hallward, who conducted an investigation in the area some weeks later, estimated that 25 villages were totally destroyed, with a death toll of 8,000.[54] Other accounts estimated 10,000 to 20,000. Another British vice consul, H. S. Shipley, wrote: "The Armenians were absolutely hunted like wild beasts being killed wherever they were met . . . I am compelled to say that . . . [the object was] extermination, pure and simple."[55]

In Europe, reports of the massacre generated calls for intervention. In diplomatic exchanges, the Ottomans denied that any massacre had occurred and blamed the Kurds. Abdülhamid argued that an independent Armenian state was not possible because Armenians were widely dispersed and did not constitute a majority in any Ottoman province. Moreover, he noted that the empire had a perfect right to suppress insurgencies, citing as parallel cases various European actions in their colonies and that of Russia in Poland. Overall, he pressed the point that the reports of oppression and persecution that were generating European sympathy were of little importance to him and his advisers.[56] In taking this stance, the sultan had correctly assessed the international situation. Given the touchy nature of relations among the Great Powers, none wished to take any action that might disturb the rather delicate power balance that had evolved after the 1878 Berlin Agreement. Divisions among them made an agreement for collective action very unlikely. The only collective action they could muster was a demand that the sultan take serious steps to implement the reforms set forth in the 1878 Berlin Treaty.[57]

When a strong response from Europe did not materialize, the Hunchak Party organized a major demonstration in Constantinople on October 1, 1895. They planned to deliver a petition for redress of grievances to the Sublime Porte (a metonym for the Ottoman central government).[58] Dadrian claims this was the first time in Ottoman history that a non-Muslim minority had dared to confront the central authorities in the capital of the empire.[59] Before the march began, the party had delivered copies of the petition to all of the foreign embassies. Just before the marchers, 2,000 strong, reached the gates of the Porte, police and soldiers blocked their way. The ensuing mêlée marked the beginning of a new round of massacres, not only in Constantinople but across the country. Peter Balakian graphically observes: "In the autumn of 1895 the map of Armenia in Turkey went up in flames. From Constantinople to Trebizond to Van to Diyaberkir, and across the whole central and eastern plain of Anatolia, where historic Armenia was lodged, the killing and plunder unfolded."[60] On January 30, 1896, the European ambassadors to Constantinople circulated a report that placed the number of Armenian deaths since Sasun at 100,000.[61] The report did not mention that thousands of Muslims had died as well. Still, in the vast majority of cases, Armenian victims exceeded Muslims "in the range of hundreds to one."[62] Over the next nine months, those totals would more than double.

Activism continued in the spring and summer of 1896. Around Van, Armenians mounted a spirited defense against continued assaults by the regular army and the Hamadiye. To put an end to the violence, the sultan promised the European powers that he would guarantee the lives and safety of the Armenians in Van. After several efforts at negotiating a resolution, the Armenian defenders agreed to leave Turkey by the Iranian border, escorted by Turkish troops. Balakian reports: "As nearly a thousand men were marched toward the border . . . they were massacred *en masse* by the troops and Kurdish tribesmen."[63]

A second major confrontation occurred in August when members of the ARF (Dashnak) seized the headquarters of the Imperial Ottoman Bank in Constantinople along with 150 hostages. The bank formed the economic heart of the empire. The Armenians demanded reform, redress of grievances, and restoration of illegally seized property. The action touched off another massacre by mobs often led by white-robed *softas* (Muslim theology students) that lasted three days. The death toll was estimated at 6,000 to 7,000. Accounts by diplomatic personnel declared that the evidence available indicated that central authorities had planned and encouraged the wholesale slaughter and stated that neither the police nor the army made an effort to stop the butchery.[64] Intervention by the French ambassador, the head of the bank, and a member of staff at the Russian embassy resulted in a safe conduct pass out of the country for those involved in the bank seizure.[65]

The massacres continued in September in the Harput district. Three weeks after the attack on the bank, the sultan ordered the attack, presumably as a measure of retribution, because Bedros Parian (aka Papkin Siuni), the leader of the group that had seized the bank, was a native of Egin. The French ambassador reported that the incident resulted in 2,000 deaths and that nearly 1,000 of the 1,500 houses in the Armenia quarter were destroyed.[66]

Prior to this time, very few historical instances of mass slaughter, ancient or modern, had approached the totals reported for the Hamidian massacres—between 200,000 and 250,000 deaths and 2,500 towns and villages destroyed. Apart from the deaths, and those who fled, the impact on the distinctive Armenian culture was incalculable. Those who remained alive lived in perpetual fear. The activities of the Armenian political parties did provide the pretext for the massacres, but most certainly those activities did not justify the scope and nature of the Ottoman response. Isolated instances of protest and resistance hardly qualify as "insurrection."

On the other side, the lack of action apart from vilification in the liberal press in various European countries and the United States, and diplomatic notes demanding cessation and reform, essentially gave the sultan and his advisers a pass by confirming the idea that such massacres would incur no retribution for the perpetrators. The lack of international response had long-term consequences in that inaction confirmed the status of the Armenians as "the other." Armenians became fair game in the eyes of the perpetrators because as Christian infidels who sought to create a political identity and status that conflicted with Muslim ideas of the proper order of society, they fell outside the boundaries that defined an evolving Turkish national identity based on Islamic principles. Once planted and cultivated, the seeds that promote the attitudes necessary for mass killing can result in overt action time and again. The events of the 1890s would constitute only the first bloody act in an ongoing drama.

RISE OF THE YOUNG TURKS

Often associated with the individuals who led the revolution that deposed Abdülhamid II in 1908–1909, the term "Young Turks" describes an intellectual and reform movement that had roots dating from the 1860s. Midhat Paşa, a leader of the original Young Ottomans, and other Muslim liberals had pushed for the adoption of the 1876 Constitution. After suspension of the constitution in 1878, Abdülhamid took measures to silence all opposition through a combination of intimidation, imprisonment, exile, and execution. Midhat Paşa was imprisoned and assassinated in jail in April 1883. Although committed to unseating the sultan and instituting a new constitutional regime, the movement did not have an agreed position on other issues, particularly those pertaining to the status of minorities in the empire.[67]

Perhaps not unexpectedly, the army became the breeding ground for leaders in a growing opposition. The sultan, fearful of a coup led by the military, had kept the regular military on "short rations," with low and irregular pay and deliberate neglect of maintenance and acquisition of new weaponry. The policy of deliberate neglect, combined with a rampant culture of corruption, produced two responses. First, conditions had led officers concerned with reform to form secret societies with the goal of promoting positive change in the form of restoration of the 1876 Constitution. One of these, the Ottoman Society of Liberty, grew rapidly, later changing its name to the Society (later Committee) of Union and Progress (CUP). Future notables Ismail Janbulat, Mehmed Talât Bey, and Ismail Enver Bey were among those most active. Second, late in 1906, a series of mutinies by army garrisons across the country began. Mustafa Kemal (later Kemal Attatürk) was not associated with the CUP.

Over the next two years, increasing defections from the army along with assaults on, and assassination of, high-ranking government officials and military officers loyal to the sultan, combined with the inability of those forces loyal to the sultan to deal with the problem, enabled the demands of the CUP to gain ground. Salonika (Thessalonika) in Macedonia seemed the epicenter of the widening unrest. The crisis came to a head in July 1908. In late July, the CUP had decided to proclaim the constitution in Macedonia, hoping that by establishing it there, they could extend it to the rest of the empire, by force if necessary.[68] The movement toward proclamation quickly spread. The sultan, bowing to circumstances over which he no longer had any influence, issued an imperial proclamation restoring the constitution on July 24, 1908.

Muslim resentment over the rights now given to Christians immediately surfaced. Economic jealousy, famine, Muslim refugees from the Balkans, and the new Christian right to bear arms quickly became issues that generated tension. Previous history emphasized the necessity for Armenians to arm themselves. In Cilicia, a rumor spread that Armenians intended to establish an independent kingdom there.[69]

From Intervention to Political Rule

An old political maxim counsels that administering the occupation may be considerably more difficult than winning the war. N. Naim Turfan writes:

> In spite of the widespread conviction that the purely political remedy of the restoration of the Constitution and declaration of liberties would cure all the ills that afflicted the Empire, in the months which followed these ills not only recurred but took more virulent forms. Political extremism grew in direct proportion to social disappointment.[70]

The CUP did not assume power directly. Ahmad argues that as a direct extension of the earlier reform movement that produced the constitution, the CUP had saving the empire as its main goal. They had little interest in social change, although a very large number of CUP leaders had come from areas on the periphery of the empire, which made them extremely aware of the woes of Muslims dispossessed by the various movements for autonomy and independence.[71] Moreover, he asserts that by training and socialization, they did not see themselves as having the capacity to rule.[72] Opponents did argue that leaders of the CUP were too young and lacked both age and the traditional status associated with high office. Beyond that, the CUP at this point lacked a centralized and coordinated national organization. Events had unfolded so quickly, they really were not prepared to take control of the administration. For the moment, they served as watchdogs of reform.

External powers took advantage of the situation. In October 1908, Bulgaria declared its complete independence, Crete proclaimed its intention to unite with Greece, and Austria-Hungary announced it had annexed Bosnia-Herzegovina. These actions directly violated the 1878 Treaty of Berlin. Turkey vigorously protested, but none of the powers expressed enough interest to intervene on the empire's behalf. Turkey received some financial compensation. Combined with the turmoil produced by the reinstatement of the constitution, events set the stage for a decade and a half of bloodletting that would include coups, countercoups, wars, and wholesale systematic slaughter of minorities seen as threats to the regime.

A crisis of law and order in April 1909 threatened a counterrevolution. A coalition of unlikely allies, Islamic fundamentalists and liberals, attempted to seize power. Setting a pattern for the future, the army intervened to restore order. In Cilicia (Adana), Muslim groups took the occasion to attack the Armenian community, claiming that they were planning a secessionist movement. The Armenians repulsed the first attacks. After the British consul brokered a truce and disarmament, troops arrived. In an ominous foreshadowing of events to come, local CUP leaders and soldiers loyal to the CUP, rather than intervening to protect, actively took part in murder and looting, resulting in an estimated 25,000 dead.[73] Reports indicate that, unlike in other incidents, some perpetrators were punished.[74]

In the wake of the countercoup attempt, the National Assembly issued a proclamation deposing Sultan Abdülhamid, replacing him with his brother Mehmed Reşad (Mehmed V). The CUP pressed the assembly to pass a series of laws that severely curtailed some of the freedoms (press, association, speech) guaranteed by the constitution. One new law, an attempt to promote and enforce an Ottoman identity, forbade the formation of any political club or association that had an ethnic basis or a national name.[75] *The legislation laid the foundation for future policies aimed at developing a distinctive Turkish national identity.*

The next three years would produce changes equivalent to those imposed after the 1878 Treaty of Berlin. Italy occupied Libya (Tripoli), with Turkey putting up minimal resistance in the following war. In turn, the perceived weakness of the Ottoman regime encouraged the Balkan states to form a series of alliances (Balkan League) to attack in October 1912. These events led to a coup in January 1913 by the CUP. The immediate issue arose out of negotiations to end the Balkan War. Edirne (Adrianople) in eastern Thrace, considered strategically important to the defense of Constantinople, was under siege from the Bulgarians. Kâmil Paşa, the grand vizier, seemed willing to cede the town in an effort to end the war. Using the issue as justification, the CUP seized the psychological moment to force Kâmil's resignation.[76] The coup brought to power the military triumvirate known as the Three Paşas: Ismail Enver, Mehmed Talât, and Ahmad Cemal (Djemal).

The Balkan Wars resulted in a humiliating defeat for the Ottoman army and the loss of almost all of the remaining Ottoman territory in Europe.[77] The loss had a radical effect on the CUP. The party reformulated its goals: "Turkish nationalism became an official current from the spring of 1913."[78] After acquiring complete political control, the CUP began to formulate plans to eliminate the "cancerous" concentrations of non-Turks. Both the language of disease and that of pest control (vermin) became common in discourses about "the enemy within."[79]

The Balkan War had another consequence. Ethnic cleansing in the former Ottoman European territories had sent perhaps as many as 400,000 new refugees (*muhacir/muhajir*) into Anatolia and Arab territories. The migration continued a pattern that had begun as the empire receded from Europe during the 19th century. The extent to which this influx became a causal factor in the genocide to come forms an open question, but the increase in the Islamic population further marginalized the Christian communities.[80] In addition, the insertion of so many desperate, destitute, angry, and openly anti-Christian people into an already unstable political and social climate added an armed and ticking time bomb to the empire's politics. At the very least, it contributed to a culture of overt hatred.

One final set of circumstances may have completed the stage set for the Armenian genocide. At the moment of the empire's humiliating defeat, Armenian leaders had persuaded the European powers to back a proposal for reform that had lain dormant for decades. Among the sponsors was Russia. The agreement signed in February 1914, literally imposed upon the empire, created two administrative zones in the six "Armenian" provinces to be overseen by European inspectors approved by the Porte.[81] Beyond resentment over another European intervention, the agreement raised fears that Russia had the intention to annex the areas in question. World War I began before the provisions of the plan could be fully implemented. In the end, the initiative produced not one bit of added security for Armenians. Instead, it added to the list of grievances and feelings of hostility of a government that already saw them as troublesome, subversive, and not an integral part of a resurgent Turkish state.

RESHAPING THE EMPIRE

To place the genocide in context, Taner Akçam claims that the resettlement policies of the CUP from 1913 to 1918 affected one-third of the population of 17 million in Anatolia.[82] Even though the empire had a long history of devising and implementing forcible population and resettlement plans, the extent and goals of the CUP policy went far beyond any prior action. Akçam characterizes the goal as "ethnoreligious homogenization," or the conscious reshaping of the demographic character of all subject groups, including Christians and non-Turkish Muslims, into a Muslim-Turkish ethnonational identity. The difficulty stemmed from the fact that Turkey was only part of a much larger Sunni *ummah* (literally community or loosely "nation") that included many former imperial territories, none of which had any desire to have any form of connection with a renewed (Ottoman-Turkish) state centered in Anatolia.

Armenians would bear the ultimate costs of the policy, but Greeks, Kurds, and others suffered as well. For example, a cable to the governor of Urfa asked him to "provide information regarding the forcible dispersal and resettlement of the Kurds among the Turkish population in the Anatolian interior in order to persuade [the former] to abandon their tribal way of life, backward values and customs and to bring them to a beneficial state through assimilation."[83] The policy deliberately separated traditional leaders, religious and secular, from their communities and dispersed them into towns and cities throughout Anatolia. The goal was to ensure that Kurds would constitute no more than 5 percent of the total population in their new settlements.[84]

Because they were seen as a threat to national security by providing pretexts for intervention by external powers, simply reducing the number of Christians by a significant number formed the government's primary policy objective in the Aegean regions and eastern Thrace. Removal operations among the Greek populace began in the spring and summer of 1913 and became more systematic in spring of 1914. The outbreak of World War I temporarily suspended operations, although for reasons of expediency and security, the Greek inhabitants of western Anatolia were removed to the interior. They would again face expulsion after the 1921 Armistice Agreement.[85]

Ziya Gökalp (Mehmed Ziya), a propagandist for the CUP, believed that a nation required "a society consisting of people who speak the same language, have had the same education and are united in their religious and aesthetic ideals—in short those who have a common culture and religion."[86] To instill appropriate attitudes and virtues in the young, the Young Turks initiated programs of indoctrination and paramilitary training. With the ultimate aim of a return to the days of a "warrior nation," the program emphasized "defense of the fatherland."[87] The CUP also wished to create a vibrant Muslim middle class by fostering and increasing the number of commercial enterprises owned and run by Muslims. In part, the seed money would come through the disposal of property seized from the Armenians. Akçam notes that the policy of economic transfer actually began during the operations to expel the Greek population from the empire's Aegean coastal areas.[88]

World War I

After the 1913 coup, Enver Paşa had assumed the position of minister of defense. He had immediately taken measures to place the military completely under the control of the CUP by removing members loyal to the old regime and other opponents from positions of authority, replacing them with loyal CUP members.[89] Both because he had some experience with irregular warfare, and because he saw the units as useful in attaining the Pan-Arab/Pan-Turanic goals associated with the broad vision of the new evolving Turkish state, Enver had founded the paramilitary *Teşkilât-1 Mahsusa* (Special Organization) in November 1913.[90] In August 1914, units were formed in Van, Trabzon, and Erzurum, ostensibly for clandestine work in fomenting insurrection in the Russian Caucasus. In fact, their main task would consist of raiding and looting Armenian villages along the Ottoman-Caucasus border. Ugur Üngör asserts recruiters deliberately sought criminals, Kurdish tribesmen, local outlaws, and Muslim immigrants.[91] Many accounts speak of *chetes* or armed outlaw gangs. These could have been either Special Organization irregulars or simply local bands who took advantage of the situation.[92]

The outbreak of war presented the CUP with numerous problems and decisions. Even though traditional Ottoman policy dictated neutrality because the war did not directly impact any Ottoman territory, Enver (with the approval of Talât and Djemal) secretly signed an alliance with Germany in August 1914.[93] Great Britain, a traditional supporter and number-one trading partner, had allied with Russia, considered a mortal enemy. Moreover, still reeling from the debacle of the Balkan Wars, in terms of finance, manpower, and materiel, the army was ill prepared to fight a modern war. Financially bankrupt, Turkey lacked a developed industrial base, modern roads, railroads, and lines of communication.[94] Yet, in the eyes of the nationalists, the war also presented an opportunity. In keeping with the goal of building a new Turkey, nationalists saw the war as an opportunity to reverse the sense of decline. They thought the conflict would enable them to enlist and mobilize inhabitants in a common cause, strengthening a new sense of nationalism while providing justification for silencing any opposition.

CONTEXTS, CLAIMS, AND COUNTERCLAIMS

First, little evidence exists to support claims that plans for the genocide existed before Turkey's entry into the war. Second, the actions against the Armenian population cannot be justified as flowing from military necessity or other contingency factors. The scope, scale, and duration of what occurred go far beyond any realistic calculus defining "necessity." Third, to extend the last point, Armenians as a group did *not* deserve their fate because they were disloyal treasonous insurrectionists and thus brought it on themselves. To say this does not ignore or seek to minimize the role Armenian activism played. On occasion, Armenian troops did "conduct operations against Muslim villages that greatly resembled the Special Organization's attacks on the Armenian villages."[95] It does reject the idea of *collective responsibility* as a response and justification for the genocide. It also specifically draws upon point one, which emphasizes proportionality as the measure of appropriate response. Referring back to the discussion in chapter 3, the principal problem of assessment and explanation of genocide flows from the dichotomous perceptions and reactions of those involved which, on both sides, are etched in graphic black and white with no allowances for shades of gray.[96]

Fourth, the main issues stem from the violence utilized and the express intent of those involved. Many other groups, including Greeks, Jews, Gypsies, Kurds, and Arabs, were subjected to forced relocation during the war without having to endure the accompanying depredations.[97] Fifth, the same held true for other policies. War requisitioning, which targeted all Christian communities, began in August 1914. Akçam observes that actions included "arbitrary arrests and murders, confiscation of houses and lands, . . . [I]n some instances the perpetrators acted under the government's direct orders. Even when government functionaries were not directly involved, local officials often simply looked the other way."[98]

Sixth, the onset of World War I contributed to the genocide in two ways: The war heightened concerns about internal security and loyalty, and, when the killing started, it ensured that the slaughter could proceed with impunity. A simple fact of international life—no state with any standing had a real interest in the Armenians beyond the politics of the moment. World War I ended the elaborate diplomatic maneuvering associated with the Eastern Question. In an era where the idea of the "nation-state" began to have real meaning and consequence, Armenians (like the Kurds) were in a state of "being," in the sense of aspiring, but never really in a position of effectively "becoming" in the sense that any sponsor of the moment had any sustained interest in seeing an independent Armenia. Yet, as World War I loomed, knowledge of European proposals for partition of Turkey into zones of influence kept hopes alive. On the CUP side, the fear of partition contributed to the negative perception of Armenians as a malignant presence in the body politic.

Seventh, although the ideology of the Young Turks in many ways ran counter to Islamic law and tradition, religion played a central role in the genocide. Muslim traditionalists regarded the idea of civic equality as contrary to the order established by Allah, which required nonbelievers (*dhimmi*) to convert or to submit and acknowledge Islamic rule. The alternative was war. For traditionalists, emancipation of the *dhimmi* meant restoration of the state of war that justified the right of the *umma* (Muslim community) to kill male *dhimmis*, seize their property, and enslave the women and children. These actions were regarded "not only as justified but also as mandatory and even as praiseworthy."[99] With few exceptions, the hierarchy of Muslim scholars, theologians, and clerics played a crucial role in conferring legitimacy on the slaughter. Mosques became places of indoctrination and incitement.[100]

ELIMINATING THIS TROUBLE "IN A MANNER THAT IS BOTH COMPREHENSIVE AND ABSOLUTE"[101]

Akçam states that "the intolerable burden of the 1914 Armenian Reform Agreement lent urgency to the Ottomans' decision to enter the war."[102] Akçam may somewhat overstate the case, but certainly the CUP saw the war as an opportunity to divest themselves of the capitulation treaties, the Armenian agreement, and any other pacts they saw as imposed and/or compromising Turkish independence. In addition, the effort, while perhaps well timed on the Armenian side in the sense of opportunity for wresting maximum concessions, could not have occurred at a less propitious time for the Turks. Note that attention seemingly did not focus on Armenian communities until after the disastrous defeat by the Russians at Sarikimiş in January 1914. Opinion divides on how ensuing events connect to the decision to conduct a campaign of annihilation.

Deportation Begins: March–April 1915

The discussions of the role of bureaucracy in chapters 2 and 3 have relevance here. Richard Rubenstein, in his work on the Holocaust, emphasizes that the existence of the extensive bureaucratic infrastructure developed to administer the empire facilitated the genocide.[103] Balakian notes:

> As the inheritors of the Ottoman government, the Young Turks were the recipients of an extraordinary bureaucratic infrastructure with which the Turks had ruled a large and complex empire for centuries . . . Although Abdul Hamid's bureaucracy was riddled with corruption . . . it had been essential to his rule of the empire.[104]

The bureaucratic assets included a very extensive system of surveillance. The provincial and military police carried out the arrests and deportation.[105]

Sporadic violence against Armenian communities had broken out earlier in December. In the first actions of the war, Russian forces, aided by Armenian partisans and volunteers, had advanced into the eastern region around Van. When Russian troops could not sustain the advance and had to retreat, the Special Organization, in a pattern of ethnic reprisal, exacted punishment for collaboration by destroying villages and murdering the males. The pattern occurred in other areas farther east with an estimated total of 10,000 victims.[106] Armenian communities bore the brunt of the massacres, but Kurds and Assyrians suffered as well. Not all the killing resulted from action by Turkish troops and irregulars. Balakian focuses on the relationship between Christians and Muslims:

> In every city, town and village a significant part of the Armenian population was financially stable, or even wealthy, and this caused great resentment and envy among their Muslim neighbors. . . . With the coming of the missionaries, a new class of educated and intellectual Armenians had emerged as an academic elite throughout the empire.[107]

He notes simply that by 1915 the material wealth of Armenians was "an open house for plunder."[108] Absent law and order, and fueled by hatred, jealousy, and greed, former neighbors willingly participated in killing and mass looting.

Within a month after the Ottoman defeat at Sarakamiş, the first systematic actions directly connected to the genocide occurred. In February 1914, all Armenian men serving in the army were disarmed and reassigned to labor battalions. Akçam argues that at this time cables exchanged between Enver and officers in the area (Ottoman Third Army) gave the authority to "exterminate" all who disobeyed government commands.[109] The army began an organized slaughter of the Armenian men in the battalions. This preceded the deportations and other mass killings that occurred later in the spring.[110] The first deportations began on April 8, 1915, with the town of Zeitun, an area that had long resisted Ottoman authority.[111]

Decisions over the next two months occurred in a context of extreme anxiety over various vulnerabilities—Constantinople would be at risk from the assault on Gallipoli and the Dardanelles campaign (beginning in mid-March). Henry Morgenthau, the American ambassador, reported that after the first round of fighting, the Ottomans fully expected a renewed assault on Constantinople.[112] Outside of the empire, Armenians in exile continued to press the Allies for an attack on Cilicia in support of a promised uprising. An Armenian revolt that succeeded in taking control of Van for a short time confirmed all the worst fears of the CUP. From this point on, a deadly dialectic ensues. Armenian responses to counter Ottoman repression provide additional justifications for further repressive actions.

Events during the winter of 1914–1915 in Van *vilayet* illustrate the dynamic. The governor of Van, Cevded Bey, had conducted a campaign of terror against the Armenian population. Arrests, torture, murder, and other forms of harassment had occurred on a regular basis. When the community refused an order to provide 4,000 men for the labor battalions, the Turkish army attacked the city on April 17. The Armenians fought back. As the fight raged, soldiers, irregulars, and others took the opportunity to attack the small towns and villages. They met with little resistance because these areas had little able manpower, few weapons, and insufficient ammunition. Estimates have placed the Armenian death toll at 55,000.[113] A Russian army regiment arrived on May 18 and had gained control of the city and environs by May 20. When Russian troops evacuated the area in late July, the Russian commanding general urged the remaining Armenians to leave the area immediately. A mass exodus toward the border with Russia began. In the ensuing chaos, Turks and Kurds killed thousands more, while a multitude of others died of starvation and other privations.

Red Sunday—April 24, 1915

With the arrest of 250 intellectual, civic, and cultural leaders in Constantinople during the evening and night of April 24, 1915, the CUP began a campaign to remove the intellectual and cultural leadership from Armenian communities. Throughout the next months, all across the empire, thousands of Armenian educators, religious leaders, writers, and other prominent public figures were targeted, systematically rounded up, and murdered. This initiative and similar policies in subsequent instances of genocide have generated the cry to broaden the formal legal definition of genocide to include "cultural" as a basis for prosecution (see chapter 1).

"Deportation" Meant Annihilation[114]

On May 27, 1915, a "provisional law" that permitted military authorities to order deportations in the interest of security and military necessity was disseminated. Throughout the summer, the scope and pace of deportations was continually expanded in Anatolia. In the fall, deportations began in Thrace. The deportations were never meant to be a process of orderly relocation. Authorities had made no provisions for food or places of rest along the way. At various sites along the routes, killing units set upon the convoys with no regard for age or gender. Bloxham makes an important point in that, while the first measures taken against the Armenians did not distinguish between innocents and those actively involved in opposition, the new policy did not differentiate between communities with a history of opposition and the great majority of those without, nor between those in the interior and those on the border. Moreover, "unlike the first Zeytun deportees, the Armenians were not to be sent to places where settlement was possible, if difficult; they were sent, defenceless and without provision or the means of subsistence, to desert regions where natural attrition could take its deadly toll."[115] Those who finally made it to the Syrian desert then faced the hardships of searing summer days and bitter cold nights without appropriate clothing, shelter, or food.

Eyewitness accounts emphasize the savagery and brutality of the attacks. Because bullets were expensive and scarce, the killers preferred to use bayonets, swords, and knives, which left gaping wounds.[116] Violent sexual assault, torture, buildings housing large numbers of refugees/deportees being set on fire, mutilation, and other physical indignities were part of the normal routine. Reacting to myriad scenes of butchery he personally witnessed, Leslie Davis, the American consul in Harput (Elâziğ) from 1914 to 1917, characterized that area as the "Slaughterhouse Vilayet of Turkey."[117] Davis concluded that "it appears that exiles have come from all directions only to be massacred in some part of this Vilayet."[118] In his memoirs, Henry Morganthau Sr., the U.S. ambassador, wrote, "When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race; they understood this well, and in their conversations with me, they made no particular attempt to conceal the fact."[119]

Assimilation

In his work on genocide, Lemkin argued that genocide in practice has two phases. The first involves "destruction of the national pattern of the oppressed group;" the second entails "the imposition of the national pattern of the oppressor."[120] Akçam argues that examination of the second aspect of Ottoman policy, assimilation of non-Turkish minorities, has been neglected for a number of reasons that have to do with availability of records as well as assumptions made by scholars.[121] Akçam believes that for the CUP, the relationship between assimilation and physical destruction depended on perceptions of *governability.* The policy aimed at preventing any collective action or preservation of Armenian nationality and culture.[122] It had three main parts: reassignment of children to Islamic households, forced marriage or concubinage of girls and young women with Muslim men, and religious conversion of adults. Obviously the first two implied a forced conversion/acceptance.[123] Conversion, when applied to adults, varied with time, place, and numbers. These arguments need to be read in context of his earlier conclusion that the parameter that governed decisions presumed that in no area should Armenians form more than between 5 and 10 percent of the total population.[124] As he states in his analysis, while worth mentioning, the proposition needs further research. Even so, to note the policy does not in any way argue for mitigation of accountability.

Russia Exits the War

The collapse of the Russian government and abdication of the tsar in March 1917 effectively ended Russia's contribution to the war effort, even though a formal peace treaty (Brest-Litovsk) would not be signed until almost a year later. The change in government meant immediate withdrawal of Russian troops from eastern Anatolia.[125] The Ottoman army moved back into the area, and the slaughter began again. Late in the spring of 1918, after the Treaty of Brest-Litovsk, Turkey invaded the Transcaucasus area around Russian Armenia. Although finally forced to withdraw by the German surrender, the five-month occupation resulted in 200,000 Armenian deaths on the other side of the border. By the end of the war, close to two-thirds of the Ottoman Armenian population had perished. Yet, the end of the war does not mark the end of the story. Two episodes immediately following the war continued the pattern of indiscriminate slaughter—the Greek occupation of territory around Smyrna (Izmir), and the Kemalist invasion of the newly created Armenian state.

The Greek Intervention

During the war, the Allies had made agreements to divide up the former Ottoman territories. Promises had been made to Italy concerning Smyrna (Izmir), but the Greeks contested the grant. The Italians had landed a force in the spring of 1919 to make good their claim. With the support of the British, the Greeks landed a force at Smyrna to forestall the Italian advance. Unfortunately, the actions of the Greek troops precipitated an outbreak of hostilities that resulted in the destruction of the Muslim parts of Adalia.[126] As news spread, tensions and violence mounted between Christian and Muslim communities across Turkey. Greeks and Armenians began an exodus toward the coastal regions.

The Greek invasion and the proposed partition of Turkey by the Treaty of Sevres (August 1920) generated a new nationalist movement led by Mustafa Kemal. Over the course of the next two years, Kemal rallied nationalist forces to fight for "Turkish independence." In the summer of 1920, the Greeks began to move inland. Turkish resistance stiffened. Bloxham states: "In the 1921–22 'war of attrition,' both sides far surpassed the atrocities committed by Greeks and Turks in 1919–20 as the conflict escalated into an outright battle for the future of Anatolia."[127] When the tide turned in spring of 1922, the Greek armies were literally driven back into the sea around Smyrna. Rummel estimates the number of Christians massacred at Smyrna in September 1922 at 100,000.[128]

CHAPTER 6

Nazi Germany: The Holocaust

> We had the moral right, we had the duty to our people, to destroy this people which wanted to destroy us.
>
> —Heinrich Himmler[1]

PERSPECTIVE

The genocide of European Jews during World War II immediately comes to mind as the case that clearly defines the term "genocide." Known as the Holocaust,[2] the deliberate slaughter of as many as *6 million* Jewish men, women, and children dominates discussions about genocide. In the area conquered and occupied by Germany during World War II that now encompasses *35* separate European countries, Nazi forces conducted a systematic slaughter of the Jewish population.

As shocking as that number may be, the focus on the horrific toll in Jewish lives often obscures the fact that the Nazis also deliberately killed another *3 million* people belonging to other groups also defined as having alien blood or otherwise considered unfit or undesirable.[3] Among those were Soviet prisoners of war, Gypsies (Roma and Sinti), negroes (term used in German law), the mentally handicapped, the mentally ill, and the physically disabled. With the outbreak of war in 1939, initial plans lumped Jews and Gypsies together in terms of "cleansing." Some estimates claim that the Holocaust claimed a half million Gypsies alone. Sybil Milton writes: "To be sure, the 'Jewish Question' loomed larger than the 'Gypsy Plague' in Nazi ideology, since Roma and Sinti were socially marginal, whereas Jews were increasingly assimilated in German society and culture."[4] In the introduction to his book of essays, *The Path to Genocide*, historian Christopher Browning has pointedly observed:

> If the Nazi regime had suddenly ceased to exist in the first half of 1941, its most notorious achievements in human destruction would have been the so-called

> euthanasia killing of seventy to eighty thousand German mentally ill and the systematic murder of the Polish intelligentsia. If the regime had disappeared in the spring of 1942, its historical infamy would have rested on the "war of destruction" against the Soviet Union. The mass death of some two million prisoners of war in the first nine months of that conflict would have stood out even more prominently than the killing of approximately one-half million Jews in that same period.[5]

The case raises many uncomfortable questions because of the circumstances. Adam Jones asks a chilling question: "How could the systematic murder of millions of helpless individuals have sprung from one of the most developed and 'civilized' of Western states?"[6] This broad question obviously gives rise to many, many others.

From this perspective, Browning makes another often overlooked point. The focus on the status of Jews in Germany in the post–World War I era tends to divert attention from the plight of Jews elsewhere, particularly in Eastern Europe. Ironically, until the Nazi take-over in 1933, the prominence of Jews in the political, social, economic, and intellectual life of Germany seemed to promise a freedom of opportunities not available in other places. Browning asks the same question as Jones, but with a narrower focus: "Why, after two millennia of Christian-Jewish antagonism and one millennium of a singular European anti-Semitism, did this watershed event occur in Germany in the middle of the 20th century?"[7]

SOME EXPLORATORY THOUGHTS ON WHY

World War I denotes an important transition. While the Treaty of Westphalia (1648) enshrined the state as the primary actor in international politics, and the French Revolution (1789) added the idea of the "nation" as a desirable goal, the two ideas did not completely meld until World War I. The settlement at Vienna (1815) after the Napoleonic Wars had attempted to set the clock back to 1788 and keep it there; but once the genie of republicanism/nationalism had escaped the bottle, it proved impossible to control. The idea of self-determination spread rapidly, particularly in the areas controlled by the Ottoman and Austro-Hungarian Empires. Equally important, a second 19th-century "revolution," industrial development, had increasingly given governments the means to put into practice policies that promoted national identity and nationalism. Along with industrialization came the expansion of scientific investigation and experimentation with a concomitant movement toward applied science. The events leading to World War I, the war itself, and the extreme dislocations afterward illustrate the unanticipated impact and consequences for states of the two 19th-century "revolutions."

The "nation in arms" (mass conscript army) with modern armament produced a bloody stalemate with "nationalism" generating hatred of the enemy that intensified as the costs of the war in both men and materiel mounted and inflicted hardships on the civilian populations. The war forever altered the landscape of international politics. It had drained the resources of the traditional Great Powers. Four empires disappeared—the Russian, German, Ottoman, and Austro-Hungarian. An undisciplined gaggle of smaller "nation-states" appeared in their stead, many with ethnonationalist designs of their own. Minorities in the new states, particularly in Central and Eastern Europe, faced overt discrimination despite the intentions of the Versailles Treaty. The peace settlement, reflective of the new climate, contained the seeds that, when nurtured, produced a second devastating war.

Zygmunt Bauman has argued that the interaction between the two sets of processes, the twin "revolutions," produced the trends that permitted, if not promoted, genocide. He found that four core concepts related to the 19th-century evolution of the modern nation-state provided the preconditions for the Holocaust: nationalism, development of modern bureaucracies and their rationales, technological means, and "scientific racism." Of these, the demands of nationalism built on ideas of nationality defined by "scientific racism" more than justified the policies of total annihilation in the eyes of the Nazis. For Bauman, the nature of modern bureaucratic routine coupled with advances in technology (gas chambers, mobile killing units) made the ideological goals possible.[8]

THE WEIMAR REPUBLIC

The conditions surrounding the founding of the Weimar Republic foreshadowed its demise. Removing the kaiser did not automatically result in a situation that furnished fertile soil for the growth of democratic institutions. From the beginning, the republic faced enormous challenges that tended to widen and deepen the divisions in an extremely fragmented political arena. The political leadership of the Social Democratic Party (SPD), which promoted and led the republic, was elderly with a mind-set that inhibited inventive approaches to the problems of postwar adjustment and building long-term stability. Yet that observation may embody an unfair judgment. The pressing nature of the problems demanded immediate palliatives if not long-term solutions in a situation of limited resources. Weitz summarizes the issues: "Weimar would always be stalked by its opponents and would never be accorded full legitimacy by the population and institutions of German society . . . The result was a contested legacy, a deeply divided civic and political culture."[9] Gerhard Rempel argues that "Germany's problem was not the absence of a Lenin or Trotsky, but rather the absence of a Gambetta, Clemenceau, Zola or Jaures, who could have instilled the nation with faith in republican democratic institutions."[10]

World War I had exhausted Germany morally and materially. The grand expectations that accompanied entry into what was promised to be a short, decisive victory had slowly evaporated as losses mounted and resources dwindled, resulting in severe hardship on the home front. The loss of productive manpower, coupled with the reality of defeat, the hardships and dislocations caused by the war, the burdens imposed by the Treaty of Versailles, demobilization of the military, and the difficult transition from a wartime to peacetime economy produced huge psychological, as well as practical, problems. Faith in authority became a casualty. Weitz states that "for many Germans, the savagery of total war undermined deference toward authority, and obedience and respect would never be wholly restored in the fourteen years of the republic."[11]

Revolution

At the end of October 1918, a series of uprisings began with a mutiny of sailors at Kiel. The discontent rapidly spread. In November 1918, three main centers of revolutionary action had developed: Kiel, Munich, and Berlin. In each one, the underlying cause was the desire for peace, much more so than the desire for genuine social revolution. Widespread unrest led to a dramatic series of events. On November 9, 1918, Prince Max von Baden, Germany's imperial chancellor, handed the reins of power to Friedrich Ebert, the leader of the SPD. On the same day, Kaiser Wilhelm II abdicated. Two days later, the SPD formed a coalition government with the Independent Social Democratic Party of Germany (USPD), a radical group of former members who had left the party (1916) over support for the war. In late December, Luxemburg and Liebknecht separated from the USPD to merge with other left-wing groups and form the *Kommunistische Partei Deutschlands* (KPD, Communist Party of Germany).[12] The political fragmentation in the socialist camp inhibited any move to make a claim to wield absolute authority.

Given the unrest in Germany, streets filled with demonstrators and pickets with paramilitaries "operating at will," Ebert feared that the conditions that had produced the widespread discontent and protests could lead to a Russian-style revolution.[13] He and his SPD colleagues were deeply committed to democracy and believed that any new regime needed legitimation through a popular vote.[14] Worried that conditions could spark a civil war like the one occurring in the wake of the Bolshevik seizure of power the year before, Ebert reached out to the old conservative elites of the empire. For the moment, the elites, also fearing the possibility of a reprise of the Bolshevik take-over in Russia, decided to work with the SPD, even though the party stood for almost all they despised.

Spurned by the SPD, the radicals, desiring to generate a genuine Marxist revolution, decided to agitate and advance their cause. In January 1919, an incident in Berlin prompted a call for a general strike that rapidly evolved into an armed uprising (the Spartacist uprising).[15] The uprising had little chance of success. As a coalition, the leadership lacked a common vision for the future of Germany and had no clear chain of command. The rebels lacked military training and equipment. Ebert moved the government to the relative safety of Weimar (180 miles east) and sought an alliance with the Supreme Military Command. A combination of army and *Freikorps* (nationalist paramilitary groups) units rapidly crushed the rebellion with little mercy shown. The uprising significantly increased anticommunist sentiment and fears of a Russian-style revolution among traditional conservative elites.

A year later, the Kapp Putsch in March 1920 aimed at undoing the results of the German Revolution of 1918–1919 by establishing a right-wing autocratic government. Elements of the army, some *Freikorps* units, and right-wing nationalists succeeded in occupying government offices in Berlin. Ebert and the cabinet escaped to Dresden. Wolfgang Kapp declared himself chancellor, announcing the formation of a provisional government. The coup attempt failed after a few days when large sections of the German population followed a call by the legitimate government to join a general strike and most civil servants refused to cooperate with officials from Kapp's putative government.[16]

The Versailles Treaty (1919)

The terms of the treaty shook German society to its very core. Perhaps the allies had exhibited a bout of psychological blindness in not recognizing the potential impact, but by the same token, German leaders had an extremely unrealistic view about the position of Germany. It seemed clear from the responses that Germany had not expected to suffer any major consequences in defeat.[17] Germany had to pay a huge price, not only in economic terms but also in pride. In addition to the economic levy, Germany lost territory in Europe and its colonies overseas; severe limits were placed on the army and navy with respect to manpower and types of weapons (prohibited from having an air force, submarines, or tanks); and some regions of Germany were occupied by French troops, while others were "demilitarized."

A general sense of humiliation and dishonor caused Germans to react in bitter fashion. In particular, Article 231, which assigned sole responsibility for the initiation of the war to Germany, caused a firestorm of resentment. The Versailles Treaty also had a clause demanding that the Germans hand over a number of "war criminals," including the kaiser, for trial by an allied court-martial.[18] Throughout the life of Weimar and after, these issues remained a vibrant rallying call. The Nazis would use the "unfairness" of Versailles very effectively, particularly after their ascent to power.

In addition, the knowledge that other states that had fought alongside Germany had been granted relief from the economic burden of reparations further fueled resentment and anger.

Problems, Politics, and Performance

Myriad challenges overwhelmed the republic's capacity to devise effective policies to deal with the issues and ultimately undermined the democratic promise of the beginning. The wartime loss of so many men in their productive prime affected economic recovery as well as normal patterns of family life. The republic bore the brunt of blame for the harsh provisions of the Versailles Treaty. Until the stock market crash in 1929 (which produced a worldwide, not just a U.S. crisis), postwar economic conditions resulted in an alteration between boom and bust—years of expansion followed by severe contractions accompanied by severe inflation. The collapse of the international economy in 1929 resulted in real restraints. As in other countries, the lives of millions of ordinary Germans became a struggle for subsistence.

Throughout the life of the republic, the political landscape in Germany remained deeply divided. Almost any political party could win a seat or two out of the 600 available in the *Reichstag* (German parliament), but parties found it impossible to build a broad base of support. The attempt to establish a democracy did not grow the deep roots necessary to sustain the institutions when challenged. The reluctance to embrace democracy—even more, the downright hostility to it on the part of many Germans—endangered the republic from its very founding.[19]

The most dangerous threat always came from the ultraconservative right wing, which curiously included the universities as well as the leaders of both Protestant and Catholic churches, and, not unexpectedly, leaders in the industrial and finance sectors. Reflective of the deep divide, the KPD (communist party) evolved into the largest in Europe outside of the Soviet Union. In the last years of the republic, the party regularly pulled at least 10 percent of the vote. In the November 1932 federal election, it garnered almost 17 percent of the vote, resulting in 100 seats in the *Reichstag*, making it the third-largest bloc after the Nazis (33 percent, 196 seats) and SPD (20.4 percent, 121 seats).[20]

In numbers, probably more Germans had sympathy for the right than for parties of the left, but support for the right remained relatively fragmented until it began to come together behind Hitler.[21] Together, the two major parties of the right, the German National People's Party, *Deutschnationale Volkspartei* (DNVP) and the German People's Party, *Deutsche Volkspartei* (DVP) garnered about 23 percent of the vote (and 98 seats) in the 1928 elections. The Nazis had a very disappointing showing, with only 2.6 percent of the vote (12 seats). But, in the next two years, circumstances dramatically changed. In the September 1930 elections, the Nazis claimed

18 percent of the vote, which gave them 107 seats, while support for the DNVP and DVP declined to a combined 11.5 percent of the vote (71 seats).[22] In the last election in November 1932, the totals of the three parties combined (43.1 percent, 258 seats) did not yield a majority but still represented a giant leap forward in terms of buidling a consensus.

Even before the international economic crisis precipitated by Black Thursday (the stock market collapse) in October 1929, dissatisfaction at home had been building. Ruth Henig describes the mood:

> The spectre of "national decline" obsessed writers and artists on the right and was a fear shared by large numbers of former soldiers and members of nationalist organizations. They believed that the Weimar Republic was hastening Germany's decline as a strong power by promoting political divisions, internationalism and class war. What was required to stop the decay was national unity, a strengthening of authority at the top.[23]

The cries of ctitics were couched in fervent, uncompromising, and ardently patriotic appeals.[24] In constrast, supporters seemed lukewarm at best. The fate of Weimar stands as proof of the old maxim: governments do not fail because they have too many enemies—they fail because they have too few friends.

Jews and Anti-Semitism in the Weimar Republic[25]

Prejudice against Jews has a long history in Europe. By having rejected Jesus, and seen as having played an instrumental role in his death, many Christian communities came to see Jews as bearing responsibility for much of the evil in the world. Prior to the creation of the state of Israel, they also lacked "place" in the sense of a territorial identity—Jews did not seem to belong anywhere.[26] Note here the status of the Jewish population in Germany after World War I. Jews occupied prominent positions in almost every sphere of mainstream German life. The problem stemmed from the perception of the extent of assimilation by influential segments of German society.

David Brenner argues that the Jewish community did not assimilate in the sense of totally adopting the values and mores of what the majority saw as German culture. The Weimar Jews had chosen not to make a radical break with their past but instead dressed Jewish traditions in the garb of modern forms of cultural expression. They sought to preserve the values important to "being Jewish," while also playing active roles as good citizens.[27] But, the preservation of Jewish distinctiveness, combined with the seemingly successful participation of Jews in a secular, non-Jewish society, still marked them as not wholly "German." This produced a tension between the incorporation of Jews into everyday life and the growth of political anti-Semitism among various organizations and political parties, especially in the immediate postwar years. The prominence of Jews in political, intellectual, and cultural life served to highlight differences and engender resentment, particularly from many right-wing groups. Weitz argues that widely held assumptions about race made assimilation a problem because "Jewishness" was seen as "in the blood," hence always a threat, perhaps even more subversive than before.[28]

Without delving too deeply into the scholarly debates over the historic roots and manifestations of anti-Semitism in Europe, several things stand out. First, within late-19th-century to early-20th-century Germany, Jews comprised only about 1 percent of the population. Second, by the end of the 19th century, anti-Semitism had become an established dogma in conservative politics within Germany. Richard Levy notes that the doctrine had wide support among intellectuals and had deep roots in many Germany universities.[29] Still, no widespread consensus existed among them with regard to the elements that underpinned the reasons for considering Jews as alien and a threat to the German way of life. During the latter half of the 19th century, older formulations had merged with the racial thinking of the time to add the idea that alleged adverse Jewish behavior stemmed from immutable characteristics of the Jewish race. A number of splinter groups with explicit anti-Semitic agendas existed in addition to the more mainline DNVP and DVP.

For the ultraconservative right, Jews had become the collective symbol for various threats and menaces caused by rapidly changing conditions that seemed to erode elements of traditional beliefs and practices that these groups defined as essential to their identity as Germans. The mantras of the right proclaimed that since 1914, Germany's problems all stemmed from betrayal at home by Jew, socialists, and other nefarious elements. Jews represented a "corrosive, un-German spirit."[30] Hugo Preuss, a Jew, had authored the first draft of the Weimar Constitution. Because of this, detractors on the right constantly referred to Weimer as the *Judenrepublik* (Jew's republic).[31] Fear of "Bolshevism" formed another main theme, with the two themes often mixing to form a double anathema: "Jewish Bolshevism." Weitz argues that Hitler invented nothing in terms of right-wing ideology. His great contribution was in rhetoric and organization.[32]

The Rise of Adolph Hitler

The most chilling aspect of Hitler's rise stems from the evidence that ordinary Germans were not necessarily drawn to the Nazi Party by its anti-Semitic stance, *but neither were they repelled by it*. The Nazi platform proved attractive to them for a multitude of reasons: frustration over political chaos and economic collapse, fear of Communism and the left, and what they perceived as the continued humiliation of Germany by the victorious Allied powers. The Nazis received the "tacit support of millions of

Germans for whom the fate of the Jews weighed lightly or not at all on the scales in comparison with their other concerns."[33] In passing, one should note that Hitler did not acquire German citizenship until 1932. Born in Austria, his family moved to Passau (Bavaria) when he was three. Hitler did serve in the German Army during World War I, but because he did not have German citizenship he could not hold public office. Even more curious, he renounced his Austrian citizenship in 1925 making him stateless and subject to deportation.[34] His Austrian roots seemed to make no difference to his followers. Per Hinrichs describes the rather convoluted set of maneuvers that eventually permitted Hitler to gain citizenship through a loophole in German nationality law:

> The then-stateless would-be politician had long been pushing to become a German citizen —a precondition for holding political office in the Weimar Republic. But, true to his characteristic megalomania, he refused to go and stand in line at the registration office like everyone else . . . Then members of the Nazi party in Braunschweig—a stronghold of the Nazi movement—eventually found a way . . . [T]hey succeeded in finding him a position with the Braunschweig land surveying office. Time was short, since Hitler wanted to run as a candidate in the imminent presidential elections. The Ministry of State then gave him the office of "administrator for the Braunschweig delegation in Berlin."[35]

Hinrichs notes that Hitler immediately went on vacation and never took office.[36]

Robert Gellately argues that Hitler succeeded because he successfully conveyed a sense of the "strong leader who was in charge" after the relative chaos of the years immediately preceding.[37] Hitler and the Nazi platform attracted popular support for many reasons, the most important of which had nothing to do with the "Jewish problem." It captured and gave coherent direction to the desires for national renewal and social reform. The Nazis carefully crafted their policies and rhetoric to elicit the consent and support of the public. While the conservative and liberal parties served special interests, the Nazis tried to maintain a broad agenda that had mass appeal. They spoke of programs to put all of the unemployed back to work. They spoke of strengthening the nation and ending the Communist threat from within. Bloxham argues that by contriving to be a catch-all party of social grievance, the Nazis were able to penetrate into and mobilize the mass of ordinary Germans, who became increasingly bound to the Nazi project by its success.[38]

Because the paramilitary wing of the Nazi Party, the *Sturmabteilung* (SA or Brown Shirts), primarily harassed and attacked Communists and Socialists, many saw them as a force for "law and order."[39] Across a broad spectrum, the public perceived the Nazis as champions of "social justice."

> The Nazis with their mass rallies and apocalyptic rhetoric, created a political forum in which the nation could be reimagined as a nationalist whole in which

> every (non-Jewish) German regardless of status had a place of honor . . . No other party appeared as opposed to special interest politics or as open to lower middle-class and working-class Germans.[40]

Following on this line of reasoning, as noted earlier, in the beginning, ordinary Germans did not necessarily embrace the Nazi agenda because of widespread anti-Semitic beliefs, but then they also did not overtly reject that part of Nazi ideology; nor did they demonstrate any great remorse for the fate of either the Jews or the Gypsies. Indeed, the first targets were not Jews "but individuals and groups long regarded as threats to the social order (like the Communists) or the moral universe."[41] On the whole, apart from the right wing, the German public was not rabidly anti-Semitic but over time became entangled in the discriminatory side of the dictatorship. The German people eventually became complicit, but not in a straightforward way. They indirectly encouraged the regime in its extreme experiments by their tacit acceptance of increasingly radical racial policies and their embrace of some of the benefits and their general failure to resist a host of subtle and more obvious moral compromises.

Many have observed that individual actions often came from personal self-interested motives such as greed or profit. Jews found themselves caught between the growing hostility of the authorities and the "escalating indifference" of their fellow citizens.[42] Doris Bergen writes that by early 1939, Nazi policies had resulted in the emigration of almost half of the German Jewish population, yet anti-Semitism continued to grow because

> many Aryan Germans who acquired homes, businesses, jobs, or promotions thanks to the expropriation or emigration of Jewish Germans discovered compelling reasons to hate Jews or at least to support policies against them . . . Gentiles who had not yet profited from persecution and expulsion could hope to do so and worried that criticism of the regime might cost them their share of the spoils.[43]

Businesses benefitted by the absence of Jewish competitors. Helping Jews became increasingly dangerous, while doing nothing was both the line of least resistance and potentially rewarding as well. Nazi policies offered great incentives for people to behave like anti-Semites even if they did not totally share the world view. As argued in chapter 3, genocide does not require the active participation (or even overt approval) of the many. It merely requires their passive acceptance.

FATEFUL ENDGAME: 30 DAYS TO POWER

The political maneuvering that finally led to Hitler's invitation to become chancellor had much to do with the perception that the left, the KPD and SPD, were increasing their political base with a fear that the two could repair their differences and unite. Two other observations seem germane at this point. First, deadlock in the *Reichstag* had produced a crisis that had for the moment ended the possibility of parliamentary rule. The stalemate had essentially shifted power to the president, who did have "emergency powers" that permitted rule by decree. None of the other major parties had produced a program that had effectively addressed the woes and concerns of ordinary Germans.[44] Second, if Hitler had not been the leader of Germany's largest party, he would never have been considered given his origins and lack of prior experience. In April 1932, Hitler ran for the presidency against Hindenburg and lost. Nicholls observes that at this time the German public had, by its votes, rejected dictatorship from the left or the right: "The fact that the Nazi leader had been unable to defeat an uncharismatic octogenarian field-marshal hardly suggests that a majority of the German people was yearning for a fascist dictatorship."[45]

In reaction to the rise of Nazi strength and electoral tactics, Chancellor Heinreich Brüning (Centre Party) declared a ban on the *Sturmabteilung* (SA) and *Schutzstaffel* (SS) in April 1932, but Brüning himself had lost the confidence of the *Reichstag* and President Hindenburg. At the end of May 1932, he was forced to resign, necessitating an election. The hard political maneuvering began after the election in July 1932. The Nazi Party had received 38 percent of the vote (230 seats), making it by far the largest party. Most alarming to those in power, however, was the gain of 11 seats by the KPD. Clearly Hitler and the Nazis had to be brought into the government, but the questions revolved around the terms. Hitler would accept nothing less than the chancellorship. Henry Turner maintains that sharing power was never a possibility for Hitler because "he was a fanatic with a grandiose sense of mission" who saw himself as "nothing less than the creator of a radically new Germany."[46] This required absolute power, not a situation that would necessitate compromise with others with lesser visions.

A second election in November saw the Nazis lose ground, receiving only 33 percent of the vote, resulting in 196 seats. Still, despite the internal and financial problems, in early January 1933, Hitler and the Nazi Party had a strong position in that any government that sought to wield effective power would have to include them. Hitler played his hand well in the negotiations that led to his receiving the appointment as chancellor. He made modest demands. He requested only one other major post for a party member (minister of interior—Hermann Göring) and accepted former chancellor Franz von Papen as vice chancellor. He became chancellor on January 30, 1933.[47] Göring used his position to replace key police personnel with party loyalists and to authorize an "auxiliary police force" of 50,000 men, composed mostly of members of the SA.[48]

Hitler had made it clear in the days immediately prior to January 30, 1933, that he would not be able to work with the *Reichstag* that had been elected in November 1932. He persuaded his colleagues that the new coalition needed a new election to ensure popular support. While the Nazi

Party did comprise the largest single party in the *Reichstag*, this did not give Hitler a working majority because the two largest parties after the Nazis (SPD, KPD) were both on the left. Within a month, Hitler had persuaded his colleagues to call for new elections, and within six weeks the Communist Party had been banned, with its members arrested or forced into hiding, leaving the Nazis as the largest, best organized political bloc in the country. Note that in the new elections, even with the authority of the state at his disposal, the Communists banned, and the thuggish tactics of the SA, the Nazi Party still only received *44* percent of the vote (288 seats) in the April 5 election.[49] *The Nazi Party never commanded a majority gained through popular vote.*

The *Reichstag* Fire: February 27, 1933

As the incident that set into motion the series of actions that solidified control of the German government by the Nazi Party, the fire that burned down the *Reichstag* (parliament building) still generates controversy over responsibility. At the time, a young Dutch Communist, Marinus van der Lubbe, was arrested, tried, and executed for the crime.[50] Whether the Nazis planned the event or just took advantage of the circumstance remains a question of some debate 80 years later.[51] Hitler effectively exploited the fear of a Communist take-over to consolidate his power. He utilized the opportunity to persuade President Hindenburg to issue an "emergency decree" that abrogated civil liberties across Germany. The decree abolished freedom of speech, assembly, association, and freedom of the press. It also permitted Hitler to order the storm trooper (SA) "auxiliary police" to arrest 4,000 Communists, SPD members, and other political opponents. Those arrested often found their detention extended indefinitely without legal proceedings of any kind.

Although the formal assertion of absolute power would await the death of President Hindenburg in August 1934, when Hitler would first assume the vacant position of president and then abolish it, the *Reichstag* fire marked the point when the Nazi Party took control of Germany's future. The April elections were no more than a formal exercise, but perhaps somewhat embarrassing in that the Nazis still did not receive a majority vote. It did not matter because Hitler effectively utilized the fear of disruption and revolution from the left to undermine what remained of the Weimar Constitution. The Enabling Act (March 23), which gave Hitler the power to make laws without consulting the *Reichstag* for four years, placed Hitler firmly in command. The process of making Germany free of Jews then proceeded in small, incremental steps.

One should not look at the "Jewish community" as an undifferentiated whole. For Nazi ideologues, "a Jew may have been a JEW," but in reality the term "Jew" encompassed vast differences in educational, economic, occupational, and class status. The gradual implementation of over 400 individual bureaucratic measures did not necessarily affect all Jews equally in terms of deprivation and humiliation.[52] Jews experienced persecution unevenly, and thus made quite different assessments of the situation. Moreover, because Jews formed a very small minority, these measures did not directly affect most Germans. The climate produced by the combination of official measures and public bullying separated Jews from their neighbors. Doris Bergen states that hundreds of prohibitions "stigmatized Jews by translating anti-Semitic ideas into everyday routines that required no effort whatsoever from non-Jewish Germans."[53]

Still, the passage of the Nuremberg Laws of 1935 heralded a new wave of anti-Semitic legislation. The laws did not identify a "Jew" as someone with particular religious beliefs but as anyone who had three or four Jewish grandparents, regardless of whether that individual recognized himself or herself as a Jew or belonged to the Jewish religious community. Many Germans who had not practiced Judaism or who had not done so for years now found themselves defined as Jews, with the obvious consequences. Jewish patients were no longer admitted to municipal hospitals, German court judges could not cite legal commentaries or opinions written by Jewish authors, Jewish officers were expelled from the army, and Jewish university students were not allowed to sit for doctoral exams. Christian converts with Jewish grandparents could be defined as Jews.

REPRESSION AND RESPONSE

In January 1933, Jews comprised *less than 1 percent* of the country's total population of 67 million (approximately 523,000 or 0.78 percent). *Eighty percent had German citizenship.* Although legal restrictions as well as instances of harassment and violence escalated each year, official German policy encouraged Jewish emigration until October 1941, when further Jewish emigration was forbidden. A substantial number left in the period immediately following Hitler's appointment as chancellor, and then in response to the initial measures aimed at reducing Jewish participation in public life. These fled mainly to nearby countries. According to the census of June 16, 1933, the Jewish population of Germany, including the Saar region (at that time still under the administration of the League of Nations), totaled approximately 505,000, indicating that a substantial number had already left by that date. Various estimates place overall emigration during 1933 at 37,000 to 38,000.[54] Over the next four years, totals would remain somewhat constant (21,000 to 25,000 each year) until a spike in late 1938 after the widespread attacks associated with *Kristallnacht*. By September 1939, approximately 282,000 Jews had left Germany and 117,000 had left annexed Austria.[55]

Emigration became more difficult for a number of reasons. Gradually, the Nazis sought to exact penalties for the decision to emigrate by depriving Jews of their property, by levying an increasingly heavy emigration tax, and by restricting the amount of money that could be transferred abroad from German banks. The taxes and regulations made emigration almost impossible for any Jew of modest means. On the other side, other states became increasingly reluctant to accommodate the flood of refugees emanating from Germany.[56] *This situation had become worse because of growing anti-Semitism elsewhere.* For example, after 1933, about 100,000 Jews annually emigrated from Poland. Massive waves also came from Latvia, Lithuania, Romania, and Hungary.[57]

Governments around the world had imposed emigration restrictions because of the economic crisis. They had little interest in accepting those who might become a public charge. Norman Naimark observes that the failure of the international community to find solutions at the Evian-les-Bains conference in July 1938 indicated that "no country, big or small, densely or sparsely populated, liberal or dictatorial, was willing to accept masses of Jewish refugees. It is hard to avoid the impression that anti-Semitism around the world played a central role in this decision, despite protestations about the practical problems of accepting large numbers of immigrants."[58]

While considerable disagreement exists over the intent of Hitler's increasingly radical rhetoric with respect to the "Jewish question (*judenfrage*)," Naimark contends that at this point Hitler sought to blackmail the West into making a deal by asserting the threat that if German Jews were not given a place to go, they would face a dire fate.[59] Even given the difficulties, Yehuda Bauer asserts that 317,000 were able to leave between 1938 and 1941.[60] Extermination replaced emigration only after the invasion of the Soviet Union in 1941.[61]

VOLKSGEMEINSCHAFT—THE PEOPLE'S COMMUNITY

Nazi ideology drew on a number of disparate themes that blended pseudoscience, history, racism, nationalism, and expansionism. The ultimate goal embodied a romantic utopianism—the creation of the *Volksgemeinschaft* (people's community) where the racially select Aryans would enjoy a productive and prosperous life. Unlike the utopian Communist community, this could come about only through a carefully crafted program of social and biological engineering guided by the state.[62] The culture of the new community would unite all members regardless of class, occupation, or region.

Nazi ideology extolled the Aryan "race" (a Nazi creation) and its place at the top of a racial hierarchy, denigrating other races as inferior and deserving to be subservient. The ideology did have an interesting internal consistency. Consider that the Nazis initiated campaigns against alcohol and tobacco use, supported research into occupationally related diseases, and promoted healthy lifestyles that included whole-grain breads and vegetables. On the dark side, it drew on "eugenics" to justify policies of selective racial breeding and sterilization, and eventually, elimination of those who failed to meet vague standards of "fitness." Perhaps not unexpectedly, they found the principles of Spartan social organization formed a historical example worth emulating.[63]

Justifications often drew on the idea of society as a biological organism that needed preventive care and treatment to keep infection from sapping its strength. Infection could come in the form of the degenerative impact of the infirmities of weaker members or the mixing of blood through offspring from sexual liaisons with members of alien races. Society was a patient that needed constant care and preventive treatment by competent physicians to ensure its ongoing health. Properly treated, the organic *Volk* would never die but retain a vibrant health. Hence, the need to preserve a healthy community would always override the needs of any individual. To protect the health of the *Volk*, the state had a duty to prevent the "life not worthy of living." Hitler wrote:

> The *völkisch* state must see to it that only the healthy beget children . . . Here the state must act as the guardian of a millennial future . . . It must put the most modern medical means in the service of this knowledge. It must declare unfit for propagation all who are in any way visibly sick or who have inherited a disease and therefore pass it on.[64]

One of the earliest laws of the new government in 1933 related to the "Prevention of Offspring with Hereditary Diseases" (July 1933). Initially, the mentally handicapped, the mentally ill, repeat criminal offenders, the physically disabled, along with those who had epilepsy, Huntington's chorea, and various other debilitating physical diseases would be sterilized. An *initial* list included 410,000.[65] The sterilization policy was justified as "purification of the national body."

The sterilization regulations would evolve into a more ominous policy based on the idea that those who have a life not worth living, even if not institutionalized, consume resources that would be better utilized to support and enhance lives that *were* worth living. The length of time it took to move from the decision to sterilize to that to sanction systematic elimination (1939) indicates a concern for adverse reaction from the German public. When the euthanasia program (*Aktion T-4*) began, it did so with the very young, gradually expanding to include older children before encompassing adults. Yet when Hitler decided that the project should include adults, he did not wish to be publicly identified with it: "Hitler and other Nazi leaders were aware that they were embarking on a draconian, though in their eyes, necessary measure for which the German public and even the official state bureaucracy were not quite ready."[66]

The official program lasted from 1939 through the summer of 1941. Unofficially it ran through the end of 1944. Gallagher reports that as the bombing of German cities during the war increased, what Germans referred to as "wild euthanasia" led to widespread, unorganized, and indiscriminate killing: "Unplanned groups and individuals were murdered: welfare wards, asocials, wayward children, healthy Jewish children, or those of mixed blood, homosexuals, political offenders, elderly wards of nursing homes, sick and healthy Eastern workers."[67] As the public became aware of the program, opposition mounted. The churches raised strong objections, and widespread public demonstrations protested the policy.

The technology and modes of transportation developed for the euthanasia centers was later utilized in the extermination camps. Many of the physicians who became specialists in the technology of mass murder in the centers became part of the staff of the death camps. The handicapped killing centers pioneered the development of gas chambers like those later used at extermination camps because other methods proved too slow and inefficient. Like the extermination camps, the handicapped killing centers had installed ovens to dispose of the dead by cremation. Some of the centers had a conveyor-belt system to carry the corpses directly from the gas chamber to the oven.[68] The program claimed over 70,000 victims during its two years of open operation and even more victims between the official conclusion of the program and the fall of the Nazi regime in 1945. The total number killed under the T4 Program, including the unofficial covert phase, may have reached 275,000.[69] The official conclusion of the T4 Program in 1941 coincided with the initiation of the Final Solution.

Racism

Purifying the *Volk* required separating those of "Aryan" heritage from everyone else, which meant classifying the entire population on the basis of racial characteristics. Weitz states that "the Nazis assumed, simply and brutally, that they understood race, and it remained the underlying principle of virtually every social program, every political campaign in the Third Reich."[70] The defining characteristics of race were particular characteristics that lay in the blood and were transmitted in whole from generation to generation. For Nazis, the "Aryan"[71] had developed all that was creative and good and deservedly stood at the top of a hierarchy of races. As part of the "Aryan" lineage, Germans were more valuable than others. Similarly, if not controlled, the blood that coursed through the veins of Jews carried "culture-destroying traits" that actively threatened Aryan superiority:

> The addition of foreign blood to one's own brings about damaging changes in the body of the race because . . . [a] blood mixture does not achieve a uniform fusion of

> two races foreign to each other but leads in general to a disturbance in the spiritual equilibrium of the receiving part.[72]

The effort to classify also encompassed "asocials, Gypsies, Negroes, or their bastards." The full impact of Nazi policies would not hit the Gypsy population until the war began.

The anti-Semitic justifications convey an interesting amalgam of playing up the potency of the Jewish threat to generate fear and abject contempt to isolate and brand Jews as an inferior breed. German propaganda directed toward the public emphasized the threat, while not unexpectedly those on the front lines of crafting and implementing the solutions used dehumanizing descriptions. In the same speech that includes the quote heading this chapter, Himmler said: "We Germans, who are the only people in the world who have a decent attitude to animals, will also adopt a decent attitude to these *human animals*, but it is a crime against our own blood to worry about them and to bring them ideals."[73] Descriptions as malignant tumors, parasites, disease-carrying insects and vermin, and as sexual predators were common. Joseph Goebbels wrote that extreme incisions were needed, otherwise all of Europe would die of "the Jewish disease."[74]

The correlation to race was space—*Lebensraum* or living space for the deserving. For Germans / Aryans to keep their place would require increased numbers, which would also then necessitate more land.[75] Expansion would mean war. Any war would be against the Jews because by Nazi logic, other enemies were "either puppets and dupes of, or masks for, International Jewry."[76] A more vital and vigorous Aryan race would emerge victorious from the struggle. Interestingly, Hitler had equated Marxism with Judaism and saw the Soviet Union as the ultimate enemy—a fight that when begun, would be "an annihilation struggle."[77] Saul Friedländer has characterized the Nazi arguments as "redemptive anti-Semitism."[78] The ultimate goal of being masters of the world meant eliminating for all time all elements of the primary obstacle and main purveyor of corrupting influences—the Jews.

Of course, the key to the accomplishment of the program meant a state with total control to craft and implement policies designed to ensure the health of the *Volk* and protect it from coming to harm from enemies, no matter their origin. In the words of Reinhard Heydrich (second in command of the SS), the National Socialist Führer State "carefully supervises the political health of the German body politic, which is quick to recognize all symptoms of disease and germs of destruction . . . and to remove them by every suitable means."[79]

German Jewry and the *Ostjuden*

The deliberate attempt of the Weimar Jewish community to assimilate had raised hard questions for German Jews with regard to their relationship to the *Ostjuden* (Eastern Jews) who had maintained their traditional ways. The two communities obviously shared a mutual heritage, but a great debate occurred during World War I concerning the impact the *Ostjuden* might have on defining German Jewishness with regard to assimilation. With the ascent of the Nazis to power, the debate made little difference. *Ostjuden* became the master icon for identification of all Jews. German Jews became simply Jews who, like all Jews, were racially defined and marked by the traits of the *Ostjuden*.[80] A Nazi propaganda textbook cautions children against Jews. A young Fritz learns about the "Jewish Swindle" from his father. The father cautions that all German Jews are former *Ostjuden* who stole German money to become rich and then shed their "filthy clothing, lice-ridden beards, and vulgar language" in order to resemble Germans. However, Fritz learns that they can never get rid of their "Jewish noses, ears, and crooked legs."[81]

Ideology and Policy

Henry Ashby Turner observes that "the many attempts to probe Hitler's mind retrospectively have produced a bewildering array of inconclusive, conflicting diagnoses."[82] Ron Rosenbaum, who systematically surveyed the literature on Hitler and his role, has described the efforts as a "terra incognita of ambiguity and incertitude where scholars clash in evidentiary darkness," concluding that a "sure sense of Hitler's mind has escaped us."[83] Many have noted that Nazi thinking on race with anti-Semitism at its core did not differ much from attitudes toward Jews in many other European countries in the era.[84] For example, Richard Goslan states that the Vichy regime (1940–1944) in France enacted a "draconian state antisemitism . . . with little or no encouragement from the Nazis."[85] New governments and populations in Eastern Europe exhibited an open hostility to Jews in the post–World War I period.[86] Jones states that "not only was antisemitism historically stronger in countries other than Germany, but the virulence of its expression during the Second World War in (for example) Lithuania and Romania exceeded that of Germany."[87]

Bloxham and Bauman argue that the Nazi movement was not an inevitable result of authoritarian traditions or other cultural artefacts of German history but that the Holocaust could *not* have happened elsewhere at the time. This observation involves a matter of scale because certainly "pogroms," organized massacres on a lesser scale, did happen elsewhere. Bloxham and Bauman argue that the particular confluence of *instability and capability* provided the necessary preconditions. The Nazi regime rose to power in a very different situation from other right-wing authoritarian regimes in eastern and southeastern Europe. Germany had an advanced industrial infrastructure that included *a well-developed bureaucracy and tradition of administration*, an evolved civil society, traditions and means of expressing public opinion, and experience with parliamentary rule where "the conflicting interests of well-organized social classes were given expression."[88]

The Nazis benefitted from the newly evolving techniques of mass communication to broadcast a program of national unity and renewal based as much on sentiment and emotion as on tangible rewards. Until the Nazis, no political party had successfully managed to bridge many of the social chasms with a message that blended appeals to traditional values and German nationalism with programs that promised economic regeneration. Anti-Semitism did not play a major role, but it formed an underlying theme. German universities had become the purveyors of "scientific racism," important because students would become part of the upper middle class and future political elite. With respect to the general public, there existed a more amorphous feeling that "Jews needed to learn their place." Jews became easy targets because of their high-profile, and seemingly disproportionate, presence in higher education, banking, and business during the Weimar era. In the popular mind, this presence gave credence to claims of undue influence. Yet, it is a huge step to convert contempt and fear to acceptance of mass murder.

Ideology and reality often clash because ideology tends to supply simple answers that ignore complex relationships. Translating ideology into policy in Nazi Germany posed two different but inextricably intertwined issues: who or what agency ultimately decided the pace and direction of Jewish policy, and the problem of consequent dislocations from particular policies. The first involved a struggle for influence and power within the party; the second involved debates between radical purists and pragmatists. Until the outbreak of World War II, the problems of formulating a consistent policy continued because whether the object was systematic discrimination to reduce influence, elimination from the economy, or forced emigration, implementing the policies to achieve the objectives often produced situations that hindered efforts to produce the desired result.

For example, the idea of making the German economy *judenrein* (free of Jews) had to deal with the reality of four fundamental economic problems: (1) the need for creating employment, (2) the need to achieve and maintain a positive trade balance to generate foreign exchange in an era when Germany had little or no international credit/capacity to borrow abroad, (3) the relationship between the rapid rearmament program and the need for foreign exchange to acquire resources that Germany lacked, and (4) the question of how Jews might support themselves if they could not work.[89] The solution to some of the problems lay in expanding Germany's foreign trade, which in turn made the leadership particularly sensitive to threats to boycott German goods. The Nazis lacked experience in these areas and had to draw upon outsiders for advice in dealing with critical elements of economic and rearmament policy.[90] Often they had to deal with Jewish-owned enterprises. For example, among the last major enterprises to be

Aryanized (1939) were two Jewish-owned banks in Hamburg whose international contacts were vital to maintaining a thriving export trade.[91]

Hitler seemed to grasp the practical limits, but with respect to Jewish policy, Karl Schleunes argues that Hitler neither specifically delegated responsibility nor kept a close watch on its development, letting those below struggle with the issues. He intervened occasionally but seldom decisively. Hitler proclaimed goals and occasionally refereed disputes. When he did direct a course of action in the early years, it was usually in response to an immediate concern, such as toning down the campaign prior to the 1936 Olympic Games to improve Germany's image abroad. At points, anti-Semitic absolutists among the lower administrative levels and the rank and file exhibited some chagrin that the promised benefits of Aryanization had not trickled down to them and demanded a faster pace. As with any ideological movement, *resentment stemmed from perceptions that in practice the policy did not seem to conform to the simple nostrums of the most radical and rabid*. That some Jews might be more valuable than others, or that international opinion mattered, would never have occurred to them.

While the racial theme defined Nazi dogma, Nazi propaganda tended to stress the specter of Jewish power and its threat, which was "more comprehensible and more consistent with what many ordinary Germans and ordinary Europeans believed."[92] Gellately observes that "Hitler and other leaders dared not articulate fully their murderous schemes. They did however, unmistakably keep hitting the same notes, making the same threats, and letting the evidence pile up."[93] The pace was never sufficient for the purist. Still, no central control of Jewish policy occurred until the difficulties in the aftermath of *Kristallnacht*. Then, the SS under Hermann Göring, Heinrich Himmler, and Reinhard Heydrich managed to gain control of Jewish policy. Schleunes states:

> The dreamlike world of anti-Semitic absolutes which moved so many in the Nazi movement to uncalculated action was never a significant factor of SS racial policy . . . Unlike the party apparatus . . . the SS recognized that any solution would have to be piecemeal and based on the harsh reality that Jews would not disappear simply to satisfy an ideological imperative.[94]

In the end, the SS accomplished its task with a deadly efficiency. The political, business, administrative, and military elites cooperated in facilitating the elimination policy. The professional German bureaucracy gladly accepted the challenge of solving the problems created by an escalating anti-Semitic policy.[95] The initiation of war, while creating additional problems to be solved, also created the rationale for the solution. Browning concludes, "Nothing helped the Nazi to wage a race war so much as the war itself."[96]

FROM EMIGRATION TO ELIMINATION

From the beginning of the regime, Jews were subject to harassment in the form of arbitrary arrests, boycotts, localized violence, and police indifference to complaints about grievances.[97] The ebbs and flows of policy would occasionally give hope that the worst had passed. Events in 1938 would finally force a decision on centralizing Jewish policy. In late March, the Polish government enacted a law that required Polish nationals living outside the country to get their passports reviewed and stamped in order to avoid cancellation of their citizenship. Germany (and Austria) had approximately 70,000 Polish Jews. Polish consulates in Germany refused to issue the stamp to Jews. Germany potentially faced a serious problem because it could soon have a huge community of stateless Jews who would have no alternative but continued residence in Germany. In an effort to force repatriation, in late October the Gestapo arrested and transported some 17,000 Polish Jews to the border, where a confrontation put them in a no-man's land for several days before the two states negotiated a compromise.[98]

The roundup and deportation caused an incident that led to the destruction during *Kristallnacht*. On November 7, a young Jewish man, Herschel Grynszpan, whose parents had been among those in the Gestapo arrests, shot an official, Ernst vom Rath, at the German embassy in Paris. Rath died the next day. Over the next few days, a massive pogrom touched nearly every city, town, and village in Germany. Arsonists destroyed over 300 synagogues. Mobs led by the SA destroyed Jewish businesses and invaded Jewish homes. The Gestapo arrested 25,000 to 30,000, interning them at three concentration camps (Dachau, Buchenwald, and Sachsenhausen).[99] To add to the anguish, some days after the devastation, Göring announced the imposition of a *1 billion* mark fine on "Jews of German Citizenship" to be paid through an assessment on all. Over the next three months, decrees followed that barred Jews from schools, public places, and owning or working in any business.[100]

Kristallnacht served as a great symbol and emotionally satisfying outlet for the radical absolutists, but it also demonstrated the need for a more coordinated approach. Pogroms, as exercises in destruction, clearly instill terror, but they tend to be an end in themselves and self-encapsulating. In this case, the disruptions to other programs based on a more calculated approach finally led to a situation that gave Göring enough leverage to take total control. Implementation fell to Himmler and Heydrich. In September 1939, Himmler created the *Reichssicherheitshauptamt* (Reich Main Security Office, RSHA),[101] which combined the Gestapo, SD, SiPo (Security Police), and the Kripo (criminal police) into one agency. Heydrich served as chief until his assassination in 1942.[102] The RSHA had a broad mission that included intelligence gathering, criminal investigation, monitoring public opinion, and Nazi indoctrination. It also commanded the *Einsatzgruppen*,[103] the elite killing units utilized in implementing the Final Solution.

The Invasion of Poland

War generated a new set of problems—it added large numbers of those considered racially inferior: Slavs and more Jews. The conquest of Poland, by adding approximately 2 million Polish Jews, made a tenfold increase in the number of Jews under German control. The total would rise to 3 million by June 1941.[104] Now the Jewish question also became part of the minority question that involved cleaning out the newly occupied territories. The problems of cleansing and resettlement would increase with each success of the German army.

With Poland, the occupied territory included the Pale of Settlement, the area within old tsarist Russia (including Poland) in which Jews could legally reside. At the time, the Pale area comprised the closest approximation to a Jewish territorial homeland in the world. This brought German troops into contact with large communities of the *Ostjuden.* Because of the Nazi success in isolating German Jews, many young German soldiers may have never seen a Jew, let alone an *Ostjude*. Browning states that the encounters gave credibility to the Nazi propaganda message. But Poles did not rank much higher in German estimation, being considered as primitive, treacherous, and anti-German. Goebbels wrote, "The Führer's verdict on the Poles is devastating. More like animals than human beings, total stupid and amorphous."[105] The easy victory over the Poles also seemed to offer positive proof of the superiority of Germans over Slavs.

The numbers meant that emigration no longer formed a viable option, although some proposals for deporting Jews to areas in Madagascar or other inhospitable places occasionally surfaced. Ideologically, the problem posed another enormous logistical challenge. Expansion for *Lebensraum* (living space) for Germans carried with it the idea of deporting the original inhabitants to make room for a new German (Aryan) population and importing good Germans in their stead. Himmler described the process as one of *cleansing the soil in the fields* by replacing the impure races in the east with worthy Germans called back to the Reich from their exile among the aliens.[106]

Within Germany, Hitler had never moved to rationalize the administrative chaos that resulted from the mutually overlapping jurisdictions and conflicting boundaries between the National Socialist German Workers' Party (NSDAP) regional bureaucracies and the administrative structure of Weimar. The regional divisions of the NSDAP, *Gaue* under a *Gauleiter*, existed in parallel with the old federal states headed by a *Reichsstatthalter*. Beginning with the *Anschluss* (merging or union) with Austria, annexed territories were placed under a *Gauleiter* who, unlike others in Germany, also wielded official government authority as *Reichsstatthalter* (Governor of a federal state). Hitler decreed that large parts of occupied Polish territory were to be annexed directly to the German Reich to increase its *Lebensraum*.

The fluid nature of Nazi administration also gave rise to new opportunities for internal empire building within the senior Nazi elite. Over time, the SS had succeeded in putting its people into an increasing number of formal leadership positions within the government.[107] With the occupation of Austria after the *Anschluss*, units of the SiPo and SD accompanied forces entering new territories. They had the task of identifying and neutralizing political enemies. As soon as the units had completed their preliminary tasks, they set up permanent stationary offices. The local commanders of the SiPo became vital cogs in the implementation of population policy and genocide. In Poland, special SS units, the *Einsatzgruppen der Sicherheitspolizei* assigned to each army group, had the task of carrying out the mission of dealing with anti-German elements in hostile country behind the troops in combat.

Although as Führer and head of the party, Hitler presumably commanded both the SS and the *Wehrmacht*,[108] considerable friction developed between the two over the level of atrocities committed against civilians by the *Einsatzgruppen*. Thousands of civilians were killed during the invasion, many by the army, but as resistance ebbed, so did army attacks on civilians. However, *Einsatzgruppen* operations continued unabated. The lack of coordination between the NSDAP paramilitary forces headed by Himmler and the formal military chain of command under the Supreme High Command (OKW) headed by Wilhelm Keitel indicated that while the OKW knew of Hitler's plans after victory, they had not been fully informed of the pace and level of the planned cleansing operations. Within the military chain, it appears that Keitel, as chief of staff, may have known of Hitler's plans but failed to fully inform Walther von Brauchitsch, commander in chief of the army. Unhappy with the challenge SS operations presented to army authority and concerned about perceptions of their professional reputation abroad, Brauchitsch sought clarification. In the ensuing set of negotiations and meetings, the exact nature of Hitler's plans for Poland became clear to Brauchitsch and others in the top military leadership. Faced with a threat that they could lose influence to the SS, they negotiated a compromise that essentially embodied the decision Pontius Pilate made when he "washed his hands."[109]

Hitler agreed to keep the army informed of all of his decisions that would affect the army's jurisdiction in Poland. This included an agreement to postpone cleansing operations until the army had withdrawn and turned over administration to civilian authorities. In reality, this made little difference other than to hasten plans for the army's withdrawal. Browning offers a devastating assessment in that, at this point, the military now had few illusions about the criminal nature of the regime, but in failing to make a stand on principle and in fostering a conspiracy of silence, the army leaders were of course behaving no differently from other elites in Germany society . . . The tragedy was that if the military had only distinguished itself from other institutions in Germany in its response . . . it could have made a difference.[110]

General Governorate[111] for the Occupied Polish Territories (*Generalgouvernement*)

Hitler had decided that most of western Poland would be annexed into Germany to accommodate the resettlement of returning "expatriate" Germans. The administrative structure, first named the General Government for the Occupied Polish Territories, was later shortened to the General Governorate (GG) to indicate that Germany viewed the area as German territory, not as part of an "occupied" state. In German eyes, Poland had once again disappeared from the map.[112]

The conquest of Poland provided an opportunity to put the ambitious ideas of Germanizing the newly acquired areas for *Lebensraum* into practice.[113] Over time, it also pointedly exposed the divergence between Nazi beliefs and the practical realities of implementation. Apart from the problems of coordinating policy among the various government agencies and party organizations, the pragmatic economic and logistical problems of moving large numbers of existing inhabitants out and replacing them with large numbers of new ethnic German settlers under wartime conditions posed difficulties never successfully resolved.

Hitler sought to solve the coordination problem by appointing Himmler Commissioner for German Resettlement and Population Policy (RKFDV). The RKFDV would have the final say over who was ethnic German (*Volkdeutsche*), where ethnic Germans should live, and what populations should be moved out, permitted to remain as "helots," or exterminated in order to make room for the German settlers. Nonetheless, Hitler had also given the German *Gauleiters* a mandate to Germanize their territories as they wished.[114] Completing the task entailed several challenges: removal of the original inhabitants and their ultimate disposition; methods to determine which individuals qualified as German; transportation, maintenance, and housing for new colonists prior to settlement; tests for screening people to determine if they qualified as German and to determine their abilities for particular varieties of settlement; development of settlement procedures, such as choice of areas; developing criteria for choosing acceptable laborers from subject populations; and finally, deciding on appropriate methods to Germanize non-Germans deemed suitable for assimilation.[115] Although it did resettle approximately 1 million *Volksdeutsche*, mainly in farms on incorporated Polish territory, the frustrations and costs of implementation, coupled with the desire for a quick resolution to the mounting problems, along with the increasing brutality of the war, pushed discussions from seeking emigration solutions to considering elimination as the only viable option.

The war placed even more serious constraints on efforts to carry out deportation and resettlement programs. The cleansing efforts in the annexed territories moved 250,000 Jews and 600,000 other Poles into the GG.[116] This added to the already significant Jewish population of the area. Warsaw alone had 350,000 Jews—about 30 percent of the city's population. With no possibility of deportation to other areas, the Nazis reluctantly embraced the idea of concentrating the Jewish population in ghettos as a temporary solution.[117]

The problems revolved around ensuring that maintenance of the ghetto would not be a drain on resources. From an ideological standpoint, many Nazis believed that the arrangement would produce a great windfall because of misperceptions about the accumulated assets of the community. Browning writes that the debate about policy centered on the goal of the temporary arrangement—attrition or production. "Attritionists" saw the ghettos as concentration camps that would extract as much wealth as possible by requiring payment for everything from food to garbage removal while keeping rations at a minimum. "Productionists" argued that until their final dissolution, the ghettos ought to be utilized as a source of cheap labor that potentially could make them self-sufficient and perhaps contributors to the German war economy.[118]

As the presumed temporary arrangements lingered, the resources of the ghetto populations were exhausted, which then posed a hard choice—to take action to make the ghettos somewhat self-sustaining or to allow starvation and disease to take its inevitable course. In actuality, decisions to evolve self-sustainability did not make a great difference. The conditions created by Nazi policy produced a situation in which

> the appearance of Polish Jewry confirmed the Nazi anti-Semitic stereotype. Ruthless expropriation and exploitation of labor combined with a totally inadequate food supply, terrible overcrowding in poor housing, and utter inadequate sanitation and medical care turn Polish Jewry into a starving, disease-ridden, impoverished community desperately struggling for survival.[119]

Interestingly, Operation Barbarossa was seen as offering a solution to the problem because victory over the Soviet Union would open up the vast spaces farther east beyond the Urals for deportation and resettlement of the Jewish population.

The Invasion of Russia: Operation Barbarossa

The German military, Hitler, and his closest advisers had totally underestimated the capability of the Red Army; or perhaps, given the relatively weak resistance encountered in the early stages of the war and the relatively low German casualty rates, they overestimated their own capabilities. John Keegan asserts that the Germans had good reason to believe in a quick victory because the senior leadership of the Russian army had been decimated in the purges (1937–1938) and had subsequently not performed well against Finland (The Winter War, 1939–1940).[120]

Nazi ideology had conflated Jewishness and Bolshevism, so that Russians became a racial as well as political enemy. This would lead to a new level of atrocity. Two orders essentially removed all restraints. The "commissar order" instructed troops not to take any military or civilian official as a prisoner of war (POW). All "bolshevists" were to be summarily executed. This extended to any individual thought to be "bolshevized" or representative of bolshevism and partisan fighters. The second order, "the Barbarossa jurisdiction decree," removed Wehrmacht actions from the jurisdiction of military courts and mandated collective reprisal for "anti-German" activities.[121]

Being taken a POW did not ensure survival—out of 5.7 million Russian prisoners of war taken by German forces, 3.3 million died in captivity.[122] Beyond the Jew–Bolshevik coupling, Ben Shepherd argues that a second rationale for the harsh policies flowed from operational reality and frustration. German forces were undermanned and spread thin. As the campaign dragged on, and the difficulty of pacification mounted, brutality began to substitute for manpower.[123] Partisan ruthlessness gave additional justification for increasingly appalling retaliations against the civilian population. As Wehrmacht losses mounted, so did atrocities in reprisal.

Over the next six months, the mass killings of Jews escalated. In Galicia alone, 60,000 Jews, including women and children, had been murdered, and Serbia and Estonia had been declared *judenrein.* However, the first blush of anticipated victory had turned into the agony of stalemate. The first success had given new life to the possibility of moving ahead on implementing the grand project of reshaping Europe to German design. The stalemate effectively quashed the euphoria. Moreover, Adolph Eichmann had stated that the number of Jews who had to be removed from the "living space of the German people" had risen from 5.8 million in mid-1940 to 11 million in the summer of 1941.[124] Moving large numbers beyond the Urals into Soviet Asia no longer existed as a viable option.

FINAL SOLUTION OF THE JEWISH QUESTION (*ENDLÖSUNG DER JUDENFRAGE*)

By December 1941, the precedent for systematic mass killing had taken root. From the middle of 1941 until the beginning of Aktion Reinhard in July 1942, the killing fields were in the occupied Soviet territories. The euthanasia campaign and the mass butchery in Eastern Europe had set the stage. Two other problems had arisen in the course of the operation in Eastern Europe. First, given the numbers of Jews alone, continuing executions by only using firing squads presented what seemed to be an insurmountable logistical problem. Second, participation in the bloodbaths of mass slaughter on a routine basis had exacted a huge psychological toll on the individuals directly engaged.[125] Frustration combined with racial hatred provided the final impetus.

The scale of the Final Solution would not have been possible without mass transport. The extermination of Polish Jews depended primarily on the railway system as much as on the efficiency of the killing centers. Rail shipments allowed the Nazi Germans to build and operate bigger and more efficient death camps. German authorities used rail systems across the continent to transport, or deport, Jews from their homes, primarily to camps in Eastern Europe. Once the systematic slaughter had begun in specially constructed killing centers, Jews were deported to these facilities by train or truck or on foot if the distances were short or trains not available. Given transport conditions, many deaths occurred during the "evacuation" process.

Experiments with gas had begun at Auschwitz in August 1941.[126] On the basis of those experiments, an SS *Sonderkommando*[127] unit began construction of an extermination center at Chelmno from which multiple mobile gassing vans would operate.[128] Prior to this gassing, vans had been used to murder asylum inmates. In late autumn 1941, officials began using mobile gassing vans on Russian POWs interned at Sachsenhausen. Browning argues that by the end of October 1941, the outlines for the Final Solution had been decided on, but the program could not get fully under way until early spring because the necessary administrative and logistical structures had to be set up.[129] A conference at Wansee (outside Berlin) in January 1942 left no doubt that the plan now included killing every last Jew in Europe.

The Nazis had operated concentration camps to intern "political enemies" since the first days of the regime. Dachau had opened almost immediately after Hitler's appointment as chancellor in 1933. Established in the summer of 1936 near Berlin, Sachenshausen evolved into the administrative center for all the camps.[130] Beginning with the war, the number of camps rapidly expanded to an estimated 20,000 that served a number of different purposes: forced labor, POW, transit, internment, as well as killing centers.[131] The camps were commanded by the SS Death's Head units, so named for their skull-and-crossbones insignia. During the Final Solution, the unit would prove the aptness of its name. Auschwitz and its commandant, Rudolf Höss (1940–1943, 1944–1945), endure as two of the most graphic and appalling symbols of the Holocaust.[132]

Although technically, concentration and POW camps did not serve as killing centers per se, along with the decision to establish killing centers, a decision was made to extend the T4 Program to rid the camps of "excess

Table 6.1
Nazi Killing Centers

Auschwitz-Birkenau	1.1 to 1.6 million
Belzec	601,500
Chelmno	255,000
Majdanek (Lublin)	360,000
Sobibòr	250,000
Treblinka	750,000 to 870,000

Source: numbers from "The Holocaust Chronicle," http://www.holocaustchronicle.org/holocaustappendices.html.

The Nazis were not the only ones to use extermination camps. For instance, from 1941 until the end of the war, at Jasenovac in Slavonia, the Ustaše (Croatian) operated one of the largest concentration-elimination camps in Europe. Croat authorities murdered between 320,000 and 340,000 ethnic Serb residents of Croatia and Bosnia during the period. United States Holocaust Museum, "Jasenovac," *Online Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005449

prisoners." The program, Special Treatment 14f13 (after its reference number in documents) presumably would proceed on a predetermined hierarchy of victims: dangerous criminals, those medically unworthy of life, and "medicalized" euthanasia of all groups considered by the regime to be undesirable—Jews, homosexuals, Gypsies, Catholic clergy, and any others viewed as morally inferior. The use of "special treatment" (*Sonderbehandlung*) in the name of the program came from a distinction that made little difference. Supposedly issued to permit discriminant decisions between life and death on the basis of criteria set out in the decree from Heydrich, "special handling" became a euphemism for the extermination of Jews in the East.[133]

In the concentration camps, prisoners were required to work. Several camps became major sources of slave labor for nearby German industries. IG Farben chose a site to construct a plant to manufacture synthetic rubber and oil largely because of its proximity to Auschwitz (established May 1940; overall operation became known as IG Auschwitz).[134] The conditions in the camps made it difficult to keep enough healthy prisoners to ensure a steady labor supply. As the war had expanded, so had the dilemmas with respect to the impact of removing Jews from productive pursuits. The Germans urgently needed to stem the ever-growing labor shortage and increase production of war-related materiel. Over time, a great tension existed between the policy of extermination and the need for skilled Jewish labor. The commander of the German forces in the General Governorate wrote to Himmler: "Unless work of military importance is to suffer, Jews cannot be released until replacements have been trained, and then only step by step."[135] The attempt to satisfy the two incompatible goals produced inconsistent policies until the decision to proceed with total annihilation.

Additionally, as with asylums, inmates were often subjected to cruel medical experiments to test racial theories. Lifton writes that, consonant with their ideology, "The Nazi project . . . was not so much Darwinian or social Darwinist as a vision of absolute control over the evolutionary process, over the biological human future . . . [T]he Nazis sought to take over the functions of nature (natural selection) and God . . . in orchestrating their own 'selections,' their own version of human evolution."[136]

Operation Reinhard (*Aktion Reinhard*)

A British commando team assassinated Heydrich in Prague in June 1942. Some have taken this action as the explanation for the horrific slaughter that followed. Although named in honor of Heydrich, the ensuing mass killings flowed from plans already in place, some since before the Wansee conference. At most, the assassination of Heydrich might have hastened the onset and pace of the killing. Systematic gassing of Jews had already begun at Auschwitz in mid-February, and shooting and gassing operations were going full tilt in the occupied areas on the eastern front. At Wansee, the representative from the General Governorate, Joseph Bühler, had asked that the Jewish question in his region be addressed immediately because it would involve no transportation problems.[137] That area would become the center of the effort. In mid-June, Himmler ordered that the GG should become *judenrein* by the end of the year.

To carry out the task, the Nazis had established three camps—Belzec, Sobibór, and Treblinka—near the ghettos. All three had begun operations by late spring 1942. The camps did not substitute for the other ongoing methods of massacre but added another dimension and capability far beyond what the mobile death squads could accomplish. The year 1942, from mid-March on, especially the seven weeks from late July to mid-September, stand out as the *most murderous* in the period of active extermination during the Holocaust, as the Nazis emptied the ghettos in the GG into the killing centers. By September, 310,000 of the 380,000 Jews in the Warsaw ghetto had perished. During their operational period, approximately 1.7 million Jewish residents of the GG and Bialystok District went to the gas chambers at the three Aktion Reinhard camps.[138] Add to this total the hundreds of thousands shot by units operating under SS instructions and orders.

Auschwitz-Birkenau

Perhaps the most infamous of the extermination camps, Auschwitz played a relatively minor role in the first stage of the genocide. Ideally situated because of its central location and excellent rail access, the site actually consisted of three camps that reflected the three purposes of the camp: detaining enemies (political prisoners), incarcerating repeat criminal offenders, and as a killing center for specifically targeted groups. While Auschwitz I had a small gassing facility and crematorium, the main killing center was located in Auschwitz II (Birkenau). To accommodate the scale of projected gassing operations, the SS constructed four large crematorium buildings between March and June 1943. Each had three components: a disrobing area, a large gas chamber, and crematorium ovens. At the height of the deportations, the operation gassed up to 6,000 Jews a day. In all, over a million Jews and tens of thousands of Roma, Poles, and Soviet prisoners of war were killed.[139]

Genocide for Profit

One of the more ghoulish aspects of the Holocaust was the extent to which the taking of Jewish property was carried. Friedländer contends that the looting of property was the "most easily understood and most widely adhered-to aspect of the anti-Jewish campaign."[140] The seizure of major assets such as real property, businesses, bank accounts, artwork, jewelry, precious metals, furniture, and household goods was done as a matter of course. At the camps, clothing and personal items accumulated and gold teeth were extracted from corpses. Workers cleaned and mended clothing for resale. A set of guidelines regulating use and redistribution of items taken at the camps included everything from precious gems to blankets, umbrellas, eyeglasses, and women's underwear to pocketknives and shaving utensils. According to a detailed report of the items taken from Lublin and Auschwitz, the items filled 825 railway freight cars. The total value of items confiscated during Aktion Reinhard has been estimated at $800 million in modern dollars.[141]

Patterns and Limits

The decision to begin the final deportations from Germany occurred in late fall of 1942. Bloxham notes, however, that there were limits to the "depth" of deportation from other countries under German influence but not direct control. Every state presented different challenges, particularly in areas such as France where implementation of the policy depended on local police and bureaucracies that had considerable independence.[142] Hence, Bulgaria deported the Jews of newly acquired Macedonia and Thrace to their deaths in March 1942. It surrendered no Jew from "old Bulgaria."[143] In contrast, Italy refused to hand Greek Jews over to Germany. Here the Nazis faced a dilemma in that concern for unity and stability in the war effort restricted the extent to which they could apply pressure for fear of splintering the alliance. The dilemma heightened as Germany began to suffer reverses in the war.

Even though the SS continued gassing operations at Auschwitz-Birkenau until November 1944, the final major deportation occurred in mid-May 1944. In coordination with the SS, Hungarian authorities finally began a systematic deportation of Hungarian Jews. The Hungarian police carried out the roundups and forced the Jews onto the deportation trains. Nearly 440,000 Jews were deported from Hungary in slightly less than two months. Most went to Auschwitz.

Resistance

Three acts of resistance—the Warsaw ghetto uprising and revolts at Sobibór and Treblinka—during 1943 heightened the determination among Nazi leaders to push for a final "cleansing" in the area of the new German Empire. An estimated 55,000 Jews remained in the Warsaw ghetto. Unknown to local authorities in Warsaw, in response to the beginning of deportations in July 1942, several Jewish underground organizations had created an armed self-defense unit known as the Jewish Combat Organization (ZOB). The German forces intended to begin the operation to liquidate the Warsaw ghetto on April 19, 1943, the eve of Passover. When SS and police units entered the ghetto that morning, they found the streets deserted. Nearly all of the residents of the ghetto had gone into hiding. The residents had taken the renewal of deportations as the signal for an armed uprising.

On the first day of fighting, with small arms, rifles, explosives, and a few automatic weapons, the ZOB fighters managed to force a German retreat back outside the ghetto wall. The German commander reported losing 12 men, killed and wounded. On the third day, the SS and police forces began leveling the ghetto building by building to force the remaining Jews out of hiding. German forces broke the organized military resistance within days of the beginning of the uprising, but individuals and small groups hid or fought for almost a month. The Germans reported they had killed 7,000 and had transported another 7,000 to Treblinka and 42,000 to Lublin/Majdanek and other forced labor camps. Those sent to Treblinka were gassed immediately; the great majority of the others would fall prey in Operation Harvest Festival in November 1943.[144]

At the Treblinka camp, news of the German military reverses during the last nine months raised fears among the prisoners that the SS would soon liquidate the camp and its remaining prisoners to erase all evidence of their heinous crimes. A group of Jewish prisoners, calling themselves the "Organizing Committee," began planning an uprising and mass escape. On August 2, 1943, the committee launched their revolt. The prisoners seized weapons from the SS storeroom, attacked the guards, and set some of the buildings ablaze. Despite gunfire from the towers, many prisoners broke through the camp's barbed-wire fences. Of an estimated 300 inmates who escaped from Treblinka that day, about 100 survived the massive SS manhunt.[145] At Sobibór in October, about 300 people escaped, but most were killed by their Nazi pursuers or died crossing the minefields. After the uprising, the Germans razed the camp, plowed up the soil, and planted crops in an attempt to destroy any evidence that the camp had existed.[146]

A Final Note on Planners and Perpetrators

Those who helped to plan and implement the genocide were not simple, uneducated ideologues—they were the educated middle class. Among the men in the leadership corps of the SS, two-thirds held the equivalent of a college BA, nearly one-third had a PhD. They created the Holocaust and "gave it that strange combination of personalized brutality and efficient character."[147] The most successful followed the practice of "working toward the Führer," which entailed using instincts and initiative to promote policies without explicit orders.[148] Anyone who has worked in a bureaucratic environment for any length of time should understand this dynamic.

Sorting out motives is difficult. As argued before, racism and hatred do not necessarily translate directly to support and participation in mass killing. Just as the natural soldier is rare, pure hatred might suffice for a few, but participation for the many, even if they share the animosity toward a subject group in whole or in part, will require other inducements or justifications. As argued in chapter 3, the real questions involve those drawn from the broader society who aided and abetted. The issues concern how an ordinary person can participate in actions that contribute to a policy that violates a fundamental moral conviction. The answer requires a moral disconnect, partially explained by "demonization" or "dehumanization" but also needing legitimation from authority (as in the Milgram experiments). Combined with self-interest in terms of ambition or need for security (remember the Depression), the result produced a situation where the process of administering a policy seldom involved a moral assessment of the policy. If it did, self-interest yielded sufficient reason to override moral qualms for many. Hatred may or may not have been a factor. Within the RSHA, promotion and recognition were tied to performance. Bloxham maintains that a "decided impact of new organizations like the SS was to encourage others along new paths or further down existing paths."[149]

Some evidence indicates the process did have an impact on individuals. Lifton notes that "people working at the killing centers would drink heavily at nearby bars and reveal aspects of what they were doing."[150] Reports on members of the *Eisatzgruppen*, the force presumably most committed to the goals, cite heavy drinking and a high rate of suicide. Richard Rhodes quotes a member of an *Einsatzkommando* group as writing about his experience: "Several members of the killer gangs had to be relieved, as their nerves had broken down completely. Even before they had started on their sanguinary job, the killer gangs were issued liquor and cigarettes before carrying out the shootings."[151] Browning reports the same in his study of Reserve Police Battalion 101, who had assignments in Poland.[152] Nevertheless, the negative reactions exhibited by these reports, even when acknowledged, obviously did not result in any significant alterations in policy.

CHAPTER 7

Rwanda and Burundi

> The government, and an astounding number of its subjects, imagined that by exterminating the Tutsi people they could make the world a better place, and the mass killing had followed.
>
> —Philip Gourevitch[1]

A BEGINNING NOTE ON PERSPECTIVE

At first blush, the circumstances of the Rwanda case seem quite different from those of the Holocaust. Yet the quote about the Rwandan government heading this chapter could just as well have been written about Nazi Germany. Nonetheless, Rwanda stands alone in that, unlike other instances of mass murder and atrocity, the state actively enlisted and encouraged large numbers of the *civilian population* to take an active part. In the short space of three months, primarily by machete and club, the genocidal crusade killed approximately 1 million Tutsi, Hutu political opponents of the regime, and others unfortunate enough to be caught up in the events. Gérard Prunier has calculated that during that time the killing rate "was at least five times that of the Nazi death camps."[2] René Lemarchand states that the genocide claimed twice as many victims in one month as the Bosnian civil war (1992–1995) did in two years.[3] *The killings wiped out one-tenth of Rwanda's total population.* A member of the Rwandan Patriotic Front (RPF) army that finally quelled the violence stated: "When we captured Kigali we thought we would face criminals in the state; instead we faced a criminal population."[4] Curiously, although the two states have been inextricably linked because of colonial administration, demography, and proximity, Burundi has received relatively little attention even though events in each country clearly have had implications for the other. Lemarchand asserts that the first case of genocide in the Great Lakes area of Africa (May to July 1972) occurred 22 years before the April 1994 mass killings in

Rwanda. In response to a Hutu insurrection, a predominantly Tutsi army slaughtered 200,000 to 300,000 Hutu and caused a large refugee problem for surrounding countries, including Rwanda. He observes that although largely ignored and forgotten by the West, the event remained very deeply embedded in the collective memories of the Hutu people in both Burundi and Rwanda.[5]

A second incident occurred in June 1993. Melchior Ndadaye, leader of the Hutu-dominated Front for Democracy in Burundi (FRODEBU), won the first democratic election, becoming the first Hutu head of state. In October, Tutsi soldiers assassinated Ndadaye and two other high government officials in an attempted coup. The coup failed, but the assassination led to a Hutu massacre of Tutsi civilians that, in turn, led to another genocidal repression by Tutsi government troops. These events precipitated a decade-long civil war that claimed another huge toll, an estimated 300,000 lives, of both Tutsi and Hutu. The impact on the Hutu was much more devastating: "The immediate consequence was the physical elimination of the entire pool of educated Hutu elites and of all Hutu officers and troops, thus paving the way for the emergence of a Tutsi ethnocracy, protected by an all-Tutsi army."[6] Unlike the result in Rwanda, the *génocidaires* won, but the refugees who fled to Rwanda, Uganda, and Tanzania carried with them the legacy of hatred.

The conflicts in both countries grew out of the struggle for control of the postcolonial independent state, not from "ancient hatreds and rivalries." Eric Hobsbawm and Terence Ranger assert that traditions are something we invent, and Ernest Renan simply says that nationalism means "getting history wrong."[7] These quotes apply equally to the evolution of "ethnic identity" in Rwanda and Burundi. The hatred that came to characterize the division between Hutu and Tutsi was in large part manipulated by elites who took advantage of artefacts of the colonial legacy to mobilize constituencies to back their drive to control the instruments of political power in the new states. This established a pattern that produced periodic episodes of mass murder in both states. Resentment, fear, and the prospect of personal gain, not nationalism, were the principal motivations. Firmly held but mistaken ideas about the past fueled the common resentment and fear. In the 1994 Rwandan case, the government overtly promoted misinformation to incite the populace to commit the genocide. Alison Des Forges noted that "organizers . . . who had themselves grown up with these distortions of history, skillfully exploited misconceptions about who the Tutsi were, where they had come from, and what they had done in the past. From these elements, they fueled the fear and hatred that made genocide imaginable."[8]

The histories of the two countries may be inextricably intertwined, but they are not quite clones even though they share similar geography, ethnographic characteristics, language, and colonial history. Nigel Watt characterizes the modern relationship as that between two nonidentical Siamese twins whose connection poisons the life of both.[9] Lemarchand asserts that "no other two societies on the continent had more in common in terms of size, social structure, traditional political systems and ethnic configurations."[10] Yet the countries are two distinct and separate states, each with its own history and distinct patterns of governance and social interaction.

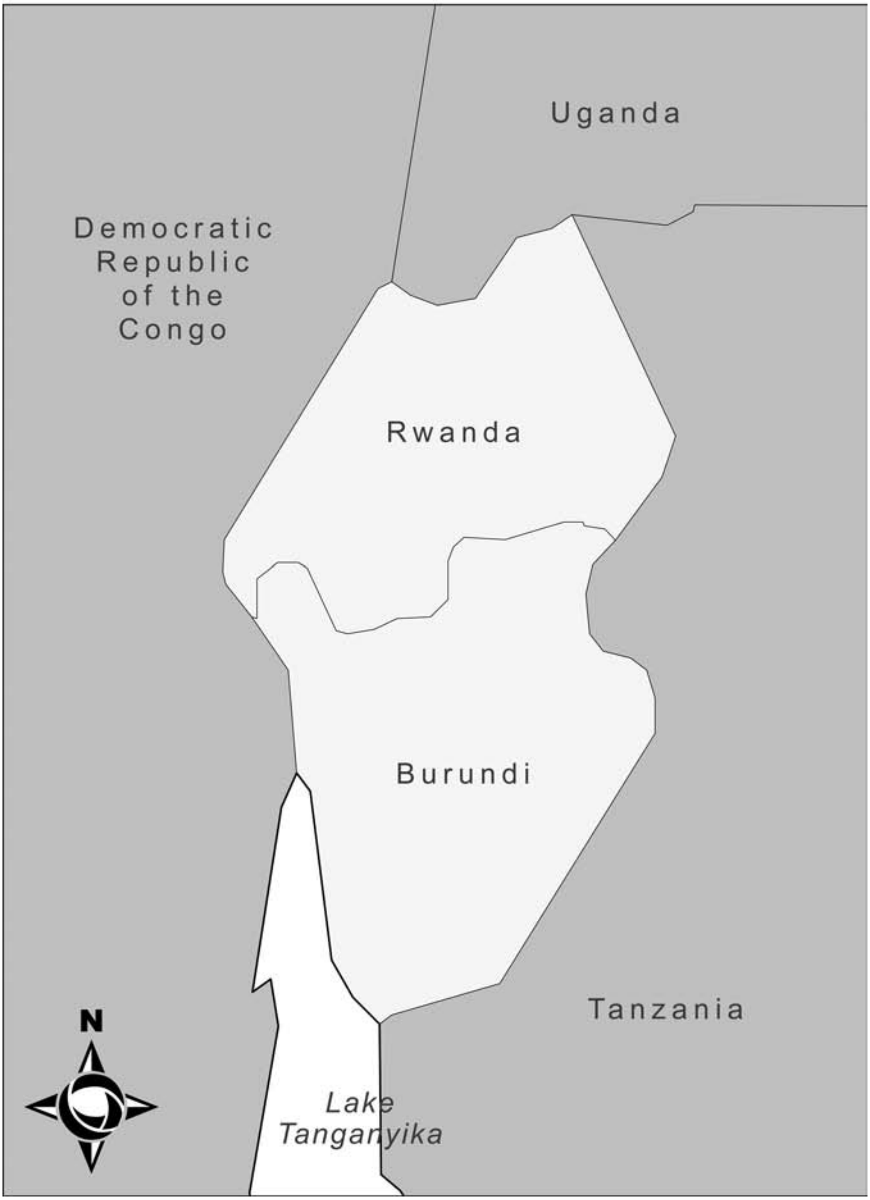
Rwanda and Burundi form part of the interlacustrine zone of East Central Africa, bordered by Lakes Kyoga (north); Victoria (northeast); and Albert, Edward, and Tanganyika (southwest). With regard to population density, they rank number one (Rwanda) and two (Burundi) among African states. By gross domestic product (GDP) per capita, Burundi is one of the five poorest countries in the world. Although not appreciably better off, in 2012 Rwanda, with a slightly larger population, still had a GDP approximately two-and-a-half times larger than Burundi. Historically, poverty and population density has produced a feeling of too many people on too little land (for comparison, both countries are about the size of Massachusetts (see Map 7.1).

The two countries have three main ethnic groups: Hutu, Tutsi, and Twa. Individuals identified as Hutu made up about 80 percent of the population in both states in 1994. Much attention has been given to the origin of the Tutsi as well as issues that concern the economic and social patterns that defined the relationship between Tutsi and Hutu. Both have generated a great deal of controversy because no reliable record of the precolonial state exists. Indigenous groups relied on oral tradition, not written records. As Philip Gourevitch points out, oral tradition is extremely malleable and can change with the purpose of the communicator: "Because their society is fiercely hierarchical the stories they tell of their past tend to be dictated by those who hold power, either through the state or in opposition to it."[11] Jan Vansina asserts that, given the nature of the political system in Burundi, "it was in everyone's interest to forget the past, whether it was the *abaganwa* who had taken the land, the sub-chief who had been dismissed, or the king himself who relied now upon one faction, now upon another."[12] In his own investigations just after the end of the Rwanda genocide in 1994, Mahmood Mamdani concluded that "much of what passed as historical fact in academic circles has to be considered as tentative—if not outright fictional."[13]

Mamdani maintains that, even if we accept that the two groups have very distinct historical origins, subsequent history has made them a "cohesive cultural unit" that lived on the same territory, intermarried and cohabited, spoke a common language, and practiced a common religion. Explaining the genocide requires looking at factors that turned Tutsi and Hutu into polarized identities with no middle ground between them.[14] Upon close examination and reflection, what becomes extremely disturbing is

Map 7.1

BURUNDI-RWANDA


Uganda
Democratic Republic of the Congo
Rwanda
Burundi
Tanzania
Lake Tanganyika
N

the seeming lack of remorse or guilt on the part of *génocidaires* in either country. This factor leads to a feeling that another episode is never far from erupting.[15]

IMPACT OF PRECOLONIAL INSTITUTIONS

Ethnicity and Identity

Mamdani asks, “Who are the Hutu and who are the Tutsi?” His response to the question is that that are many answers with many variants:

> At the one end were those who claimed the difference did not exist or that it was simply a “normal” socioeconomic difference: either a class difference between poor and rich or a division of labor between agriculturalists and pastoralists . . . At the other end were those who maintained the difference to be sociobiological: Hutu and Tutsi, they said, were two distinct peoples with separate histories until Tutsi migrants conquered the settled Hutu communities.[16]

Tutsi and Hutu do have different origins and physical prototypes. Beginning with the first European contact, the Tutsi have been commonly described as tall with thin, angular facial features, in contrast to the Hutu, who are often portrayed as short, stocky, and thick-lipped. In the contemporary world, intermarriage, however, made these physical characteristics an extremely imperfect predictor of ethnic identity, particularly to outside observers. Today one finds as many short Tutsi as tall Hutu. Moreover, although in both Rwanda and Burundi, theoretically, ethnic identity derives from patrilineal descent, the many children of mixed marriages have further blurred the Tutsi–Hutu distinction. While these issues are of interest to historians and mythmakers, the events of the past 60 years have their primary roots in developments during the 19th century and colonial occupation.

Hutu and Tutsi fit neither the classic definition of tribes nor that of clans.[17] Lemarchand argues that “the tribalist argument connotes a degree of cultural and physical distance among groups not found between Hutu and Tutsi.”[18] Still, the two ethnic identities are not pure invention or mere “figments of the colonial imagination.” They have been reshaped and “invested with a normative load they did not at first possess.”[19] Drawing on studies of ethnicity, Lemarchand and Mamdani both posit that the differences became emphasized and polarized in a process of constructing a political identity for the purposes of mobilization. In contemporary Rwanda and Burundi, the two identities fit Benedict Anderson’s idea of “imagined communities.”[20] Both groups now present a set of greatly simplified and presumably irrefutable propositions about the origins and characteristics of the two identities.[21] That Hutu greatly outnumber Tutsi (and Twa) gives face validity to Hutu claims of having been an oppressed minority because prior to colonial rule, Tutsi occupied most positions of authority and were then favored under colonial rule. Still Marcel d'Hertefelt observes that the development of a distinctly ethnic rather than a social boundary seems to have been the product of the 19th century and increasing social stratification.[22]

At the point of contact with Europeans, the main kingdoms in the area had had a strong central authority in the form of a king (*mwami*) and court for at least 200 years.[23] General agreement exists that prior to Belgian occupation there seems to have been no systematic violence based on animosity between Hutu and Tutsi. This does not suggest residents led an idyllic, pastoral existence because, just as in Europe, court intrigues and wars to protect the kingdoms from challengers or to expand areas of control were an endemic occurrence.

Burundi: Governance and Expansion

Burundi had evolved a complex hierarchy. Lemarchand notes that the principal difference between the two states comes from the fact that Burundi had evolved a more pluralistic social structure. The Tutsi did *not* control political rule in Burundi. A "princely class" (*ganwa*) whose identity was distinct from either Hutu or Tutsi ruled. Administration consisted of a large number of chiefs and subchiefs responsible for various functional areas, such as tax collection, military recruitment, or land management. Chiefs were chosen in about equal proportions from the two princely factions, Tare and Bezi, and from both Tutsi and Hutu. Hutu and Tutsi chiefs had equal status with those chosen from the *ganwa*.[24] Apart from the chiefs and the *ganwa*, ethnic identities did not necessarily coincide with status differences. Among Hutu and Tutsi, the pecking order was more complicated. The logic of numbers meant that on the whole, there was greater socioeconomic inequality between Hutu and Tutsi than within either community. Still, depending on luck and individual ability, some Hutu elements could end up with considerably more influence, wealth, and social recognition than the average Tutsi.[25]

The same applies to the Tutsi. Tutsis from Muramvya (Banyaruguru) saw themselves as superior to those from Bururi (Bahima).[26] The difference between the Tutsi-Banyaruguru and Tutsi-Hima is one of status, not geography. The Hima barely rank above the Twa in terms of status, while the Banyaruguru had historical connections to the monarchy. Indeed, Lemarchand argues that social status, not ethnicity, determined rank and privilege—that in precolonial society "hutu" often simply described a subordinate in a client–patron relationship.[27]

The royal family (the a*baganwa/ganwa*, princes of the blood), of which the *mwami* ranked as first among equals, ruled collectively. Outside of the royal domain, the country was divided into provinces under the authority of chiefs who with very few exceptions came from the royal family. Albert Trouwborst notes: "In reality the powers of the king were not unlimited . . . There were always powerful chiefs who could oppose royal decisions and could acquire and preserve considerable independence, particularly in outlying regions."[28] The struggle for power, however, was primarily between the *ganwa* and had little to do with Tutsi–Hutu relations.

The chiefs exercised total administrative authority over their provinces, including the right to assess taxes and benefit from the work of the residents. They administered justice and controlled their own fighting men.[29] Chiefs had the right to designate their sons as successors, but somewhat similar to 14th-century Europe, an extremely competitive struggle for power and position among the *ganwa* meant that heirs could face direct challenges from other nearby *ganwa* who would seek to enlarge their estates at the expense of their weaker neighbors. Deputy chiefs were appointed from among the sons of prior deputy chiefs or from among the sons or friends of the chief. For the most part, deputy chiefs were chosen from princes, or the Tutsi, but there were also Hutu among them.[30] The competitive struggle meant that the *ganwa* had to maximize support among both Hutu and Tutsi. Antagonizing a sizable segment of the Hutu population could result in a substantial decrease in their resource base and loss of legitimacy.

Somewhat paralleling the time frame in Rwanda discussed later in the chapter, the death of Mwami Ntare Rugamba began a long period of conflict among the *ganwa* as well as a period of expansion for the kingdom. Over the next 50 years, Burundi aggressively developed from a relatively small kingdom tucked between two much more powerful political entities, Rwanda and Buha, to control an area twice its original size. A struggle between the new *mwami*, Mwezi Gisabo, and his older brother (known collectively as the Batare) resulted in Burundi being divided into spheres of influence with each princely ruler seeking to become a "kinglet" by extending his domains at the expense of his neighbors.[31]

Rwanda: Governance and Expansion

Without delving into the question of origins of the social structure, by the time the kingship had developed *in Rwanda*, Tutsis had emerged as the upper cattle-owning class with Hutus as *primarily* peasant farmers. Still, that dichotomy does not capture the entire picture. D'Hertefelt suggests that the monarchical institution might have begun with the Hutu population. He notes that several small Hutu monarchies existed in the area, some surviving within Rwanda itself into the 20th century.[32] For contemporary history, the reign of Kigeri IV Rwabigiri (1860–1895) stands as the most important era in terms of explaining the roots of contemporary animosity.

The *mwami* stood at the top of an elaborate administrative structure that comprised several levels of chiefs.[33] Kings came only from Tutsi lineages. The contrast with Burundi was great. The king had ultimate authority. He governed through great aristocratic families that were not necessarily descended from former kings. To these he allotted lands with relatively fixed boundaries. Such lands and offices were semihereditary in the sense that they did not automatically pass to a designated family successor on the death of the office holder. The king or other superiors held the right of appointment at all levels.[34]

King Kigeri IV Rwabugiri, who came to power in 1860, is the pivotal figure. In a series of military campaigns, he subjugated most of the remaining smaller states in the regions, many of which were ruled by Hutu kings. Along with the campaigns to extend the realm, Rwabugiri took steps to centralize power within the kingdom. Over time, this resulted in major alterations in the nature of patron–client relationships, land tenure, and ultimately social mobility. Patron–client relationships changed from ones of reciprocity to exploitation. Changes from lineage control over lands to land holding as political grant (*ibikingi*) from the king generated uncertainty because there was no assurance that lineage heads who had traditionally served as chiefs of land would continue to do. Over time, the new system eroded the unity and importance of local lineage groups and facilitated the acquisition of greater control and prerogatives of the chiefs.[35]

In the new system, a different form of clientship (*ubureetwa*) was imposed on the Hutu by new hill chiefs who replaced lineage heads. *Ubureetwa* entailed forced labor for the chiefs performed as "payment" for living on and using the land. This effectively curtailed whatever social mobility the Hutu might have had and began the polarization of the social difference.[36] Jean Népomucène Nkurikiyimfura observes that the changes increased the hold of the regime on the inferior and middle classes while strengthening ethnic feeling at both the top and bottom of the social hierarchy. In addition,

> the *mwami* (king) and his great chiefs considered that several elements, Bahutu and Batwa, could be integrated into their group . . . for their potential for making useful family connections. To give access to the new *ibikingi* holdings . . . they frequently proceeded to "tutsify," what some have also called "ennoblement," which confuses the lineage of some high ranking [Batutsi] leaders with the common Batutsi . . . In the period following institutionalization of the ibikingi holdings, many chiefs obtained "ennoblement" for their favorites . . . But this "ennoblement" prevented the birth of a distinct Bahutu chiefly class which could have become a privileged intermediary between the court and the larger population.[37]

The resulting difference in social structure between Burundi and Rwanda meant that open hostility between Hutu and Tutsi emerged somewhat later in Burundi, in large part fueled by events in Rwanda.[38]

THE COLONIAL LEGACY

Roger Botte emphasizes the impact of disease and famine on the populations in the area at the end of the 19th century, noting that "in Rwanda and in Burundi the nineteenth century ended in distress and affliction: epizootics, epidemics, famines, and colonial conquest."[39] He notes further that "forty years later, the socio-political and economic upheavals brought about by colonial rule were to liquidate whatever subsisted of precolonial society, Pierre Ryckmans referred to the colonial period as the 'Belgian peace.'"[40] Ryckmans served in Ruanda-Urundi from the time Belgium first took control until 1928. His biographer observes that the words flowing from his pen tended always to underline the preeminence of the Tutsi thereby reinforcing the major cleavage existing in the country."[41] Ryckmans wrote:

> The Batutsi were meant to reign. Their fine presence is in itself enough to give them a great prestige vis-a-vis the inferior races which surround . . . It is not surprising that those good Bahutu, less intelligent, more simple, more spontaneous, more trusting, have let themselves be enslaved without ever daring to revolt.[42]

That attitude would have devastating consequences for the future.

Rwanda

Whatever disputes exist concerning precolonial history, near unanimity exists on the impact of the colonial experience on social stratification. Mamdani makes an extremely important point: "The racialization of the Tutsi/Hutu was not simply an intellectual construct, one which later and more enlightened generations of intellectuals could deconstruct and discard at will."[43] The colonial legacy made racism an integral part of an institutional structure that defined the essential relationships in postcolonial society. During Belgian colonial rule, the process embodied a mutual enterprise between the Catholic Church and the colonial state.

The Rwabugiri reforms had begun the process of institutionalizing caste status. The precolonial administrative structure, including the *mwami*, continued into the colonial era, now with the Belgians systematically setting policies that favored Tutsi and overtly discriminated against Hutu in every facet of political, economic, and social life. The divide became "racialized" not only through a "scientific racism" that placed Tutsis at the top of the racial hierarchy but also through institutions that embedded the ideology and reinforced it. The local administrative policies that had permitted Hutus hope of some participation in governance totally disappeared as the Belgians continued the policy of centralization that rewarded Tutsi elites.[44] Tutsis enjoyed a monopoly on administrative and political jobs and entrance into schools while Hutus watched their "already limited opportunities shrink."[45] The Hutus bore the brunt of the new regulations concerning required (forced) labor that made the obligation an individual rather than collective obligation.

The schools taught the doctrine of superiority-inferiority, resulting in both sides developing "authoritative" narratives to justify the evolving unequal relationship. To seal the dichotomy, the Belgians conducted a census in 1933–1934 in order to issue identity cards that classified every Rwandan as either Hutu or Tutsi or Twa. As an emphatic note here concerning differences, the judges of the International Criminal Court for Rwanda could not decide if the massacre met the definition of genocide until they concluded that the designations on the identity cards would suffice because the other usual distinctions that identify differences in race/ethnicity did not seem to apply.[46]

MOVING TOWARD INDEPENDENCE

Burundi: To Independence and Genocide[47]

The patterns of change in Burundi during the colonial period did not exactly mirror those in Rwanda, although they did produce their own set of tensions. The politics of ethnic identity as a method of indirect rule played a much lesser role in Burundi. Ethnic identity would become a major factor only with the forced interaction with Rwanda beginning with the political turmoil that preceded independence. The monarchy, rather than being abolished, served for a short while as a heartening symbol of unity. Factional rivalry in the *ganwa* (ruling elite), not ethnic identity, structured the Burundi political context.

Under pressure from the United Nations, the Belgians had issued a decree in July 1952 that laid out a 10-year plan to prepare Rwanda and Burundi for eventual independence. Nonetheless, not until November 1959 did the Belgians commit to a program of political reform in Burundi. With the prospect of independence in sight, political parties began to form with the ultimate prize the right to control the newly independent state. Before independence, no fewer than 23 political parties were officially registered.[48] Of these, only two played a significant role initially: the *Union pour le Progrés National* (UPRONA, Union for National Progress)[49] and the *Parti Démocratie Chrétien* (PDC, Christian Democratic Party). Belgian authorities distrusted UPRONA as radical, anti-Belgian, and Communist influenced. They gave full support to the PDC while at the same time placing obstacles in the path of UPRONA. The largest of the Hutu parties, the *Parti du Peuple* (PP), had little electoral impact. The PDC coalition won 70 percent of the seats (2,004) with UPRONA managing to take only 19 percent (545). Supporters of UPRONA managed to catch the attention of the UN Trusteeship Council, which had also had complaints from Rwanda about Belgian management of the transition there.[50] Belgium took no action to address complaints from Rwanda, but after negotiations moved elections for the legislature that would design the central political institutions of an independent Burundi to September.

For the first time, Hutu–Tutsi conflict began to appear. In January 1962, prior to independence, the first deliberate murders of Hutu public figures by Tutsis occurred in Bujumbura. The UPRONA youth section, the *Jeunesse Nationaliste Rwagasore* (JNR, later the *Jeunesse Révolutionaire Rwagasore*, or JRR) attacked prominent trade union and PP leaders. The action, though that of a few militants, reverberated through the party.

The "Rwanda model" began to gain ground as the ideal solution among Hutu political activists. Observing events in Rwanda, reinforced by the large number of Tutsi refugees flowing over the border, for the Tutsi the "Rwanda model" embodied a frightening scenario to be avoided at all cost. These two attitudes drove extensive mobilization efforts. As tensions mounted so did Tutsi actions to curtail Hutu political influence and activities by legal and extralegal means, including terror attacks and assassination. This created a reverse flow of Hutu refugees from Burundi into Rwanda. A critical point occurred in May 1965 with the first elections to the National Assembly held after independence (July 1962). Hutu candidates won 23 of the 33 seats, but Mwami Mwambutsa appointed a Tutsi (Bezi), Léopold Bihumugani (Biha), as prime minister. The court also announced plans to reduce the number of communes (administrative districts) by half through consolidation, thus decreasing the number of burgomaster (magistrate or mayor) positions, many of which were held by Hutus.[51]

The "Rwandan model" almost became a reality in October 1965 when a group of Hutu *gendarmerie* and army officers assassinated the prime minister and attacked the royal palace in an unsuccessful coup d'état. The coup effort quickly collapsed, but this did not prevent the outbreak of ethnic violence in the countryside. Armed bands of Hutu vented their anger against anyone they thought a Tutsi. In the aftermath, 38 Hutu officers were arrested and shot; 10 leading Hutu politicians were summarily tried and executed. In the aftermath of the coup attempt, Mwami Mwambutsa quickly fled to Switzerland. Another major purge followed in September 1969, when rumors of another Hutu-engineered coup led to the arrest and execution of scores of influential Hutu personalities. By then the Hutu leadership had been virtually eliminated.[52] A coup headed by Captain Michel Micombero (November 1966) formally abolished the monarchy and proclaimed a republic. The coup marks the beginning of the First Republic and the appointment of a predominantly Tutsi government. With the advent of the First Republic, Tutsis became dominant in the army and the government, with Hutu elites now facing overt discrimination.

The rise of Micombero indicates another important transition often not addressed. Cutting across the Hutu–Tutsi divide, the other major social cleavage involving Tutsi versus Tutsi played an important role. With the rise to power of the army, a reversal of status occurred in the hierarchy of rank and privilege. The real holders of power within the army and the government self-identified as Tutsi-Hima as opposed to the higher-status Tutsi-Banyaruguru. Indeed, clan and regional divisions within the Tutsi and Hutu camps at times formed a more formidable obstacle to a sustainable peace agreement than the Tutsi–Hutu cleavage.

Burundi: Countdown to Genocide

The coup by the army resulted in major institutional changes. The new regime abolished the National Assembly in favor of a new National Revolutionary Council that had 17 members drawn from the military, of which 13 were Tutsi.[53] Micombero also sought to revive UPRONA as a force for "revolutionary unity" by bringing together the young (JRR), workers, and students. Lemarchand has concisely stated the problem. The inherent constraints on the capacity of the new structures to promote unity flowed from the circumstances associated with their creation. The exercise began as a move to forestall a Hutu take-over and curtail the influence and power of the monarchy. How could it evolve into something more than an expression of Tutsi hegemony?[54] The intra-Tutsi rivalry exacerbated Tutsi–Hutu relations because it devolved into a competitive Hutu-bashing contest—an exercise in "ethnic-outbidding" where each faction played mainly to its own constituency, often to block measures that it did not like. In this situation, moderation or accommodation had little traction.[55] In the months leading up to the May 1972 genocide, the government seemed to be tottering on the brink of anarchy.

A Hutu revolt began on April 29, 1972. The rebels attacked and killed every Tutsi they could find as well as Hutus who refused to join. Estimates of casualties from the first week run from 2,000 to 3,000. No reliable count of insurgent numbers exists, but Lemarchand and others estimate "a few thousand."[56] The army managed to restore order within a week. Micombero asked for military assistance from President Joseph Mobutu of Zaire (Belgian Congo). Micombero then ordered the Burundi army to move into the countryside. The slaughter continued into August, claiming an estimated 150,000 to 200,000 victims, which included a great percentage of the Hutu elites. An observer noted: "In area after area no educated male Hutu is believed to be alive. This is particularly true in the south where we have word from a growing number of villages that no Hutu males remain at all."[57] Jean-Pierre Chrétien observes:

> The corpses of children and teenagers removed from school benches probably occupy only a small part of the mass graves hastily dug across Burundi between May and July 1972. Nonetheless, the "ethnic" cleansing in the schools constitutes one of the most odious and terrifying acts of revenge by the State. It was ruthless and relatively well organized.[58]

No one in Burundi was ever held accountable for these events; nor did the international community take notice. Large numbers of Hutu refugees went to Tanzania and Rwanda, where the trauma remained with them. The carnage drastically altered the structure of Burundi's society. It also hardened the new identities. From the Hutu perspective, the label "Tutsi" now carried "a powerful emotional load, conjuring up an image of the Tutsi as the embodiment of moral perversity."[59] These memories would form a volatile tinder that would later need just the right spark to ignite a firestorm of bloody revenge in the form of genocide in Rwanda and continuing civil war in Burundi.

Rwanda: Independence and the First Republic

World War II spurred changes in Rwanda. Some, such as the evolution of a cash economy, undermined traditional authority patterns. Others, at least in the short run, reinforced them. The Catholic Church had opened its ranks and now had as many African priests as whites, although these were predominantly Tutsi. Political reform started earlier in Rwanda than in Burundi. The Belgians issued a decree in July 1952 that laid out a 10-year plan to prepare Rwanda and Burundi for eventual independence. The decree mandated a change in the administrative structure based on chiefdoms to a more modern system of representation in the form of "elective councils." The process started almost immediately in Rwanda.

Most importantly, the Tutsi chiefs and subchiefs still controlled the nominating process. Along with the director of the territory, the chiefs had a veto. The mattered little because

> this control by the chief and administrator would be exercised only in extreme cases. It appears that all candidates nominated [by subchiefs] would be from their own lineage, from their "immediate area," or from their servants and clients.
>
> So this was a transference of power, but mainly within the group that already possessed it, that is to say, the Tutsi class. The decree left intact the position of the upper class in the government and the country. Indeed, in 1952, almost all heads and deputy heads of Ruanda and Urundi belonged to this class.[60]

If Hutus were included, they were still subordinate. The process left two disaffected groups: the Hutu and the "petit-Tutsi," neither of whom shared in the presumed benefits. At the highest level, the Tutsi simply denied that a problem existed because they had no inclination to accept a shared power arrangement that they believed would violate "the natural order of things."[61] They were more concerned with making sure that they would be the beneficiaries when the transfer of power occurred. Mamdani concisely summarizes the situation:

> Colonial power did not erase precolonial realities but added to them: on the one hand it so sharpened the late nineteenth century contrast between Tutsi power and the Hutu absence of power as to accentuate it as a one-dimensional reality; on the other, it stigmatized Tutsi power as alien rule.[62]

Four other trends became important factors in the struggle for political position in the immediate preindependence period. First, after World War II, a new class of Belgian clerics, who had greater sympathy for Hutu grievances, came to the area. This opened up the educational system and opportunities within the church hierarchy to Hutus. Second, the evolution of a money economy meant that cash began to count more than cows in assessing wealth and status, again providing Hutus with alternatives outside the increasingly oppressive semifeudal patron–client relationships. The combination of access to education and economic opportunity generated the foundations for an evolving Hutu counterelite and a growing Hutu middle class. Third, a rift had opened between the Tutsi elite and church and colonial authorities over the pace at which the transfer of political authority to local elites was taking place. In 1956, Mwami Mutara III Rudahigwa called for an immediate end to Belgian occupation. Prunier observes that the Tutsi elite fully realized that changing circumstances meant that they could not wait for too long for the Belgians to transfer power to them if they wished it to happen without opposition.[63] Fourth and finally, with the changes in Rwandan society and the church itself, the church found itself in a position where it could no longer provide an integrative religious ideology to buttress the state.[64]

A rift had opened within Tutsi ranks. Chief Prosper Bwanakweri and a group of young progressive Tutsis had begun a process of liberalizing social relationships within his realm. Mwami Rudahigwa asked the Belgian authorities to deport Bwanakweri as a dangerous subversive. The Belgians complied with the request, ending Bwanakweri's efforts and sending a message to others within Tutsi ranks who advocated liberal reform measures.[65] By his close alliance with the conservative Tutsis that resulted in his undercutting proposals for greater Hutu representation and land reform, the *mwami* lost the allegiance of the emerging Hutu leadership.

Mamdani concludes that it was the taste of reform that convinced the Hutu leadership that only radical change would suffice because none of the promoted reform measures had resulted in improving Hutu access to positions of power and influence at any level within the governing structure.[66] The reforms granted rights of participation without any significant corresponding change in the structure of representation within important governing councils and assemblies. In 1957, Hutu intellectuals produced a 12-page document entitled "Notes on the Social Aspect of the Racial Native Problem in Rwanda,"[67] which became known as the "Bahutu Manifesto." The title yields considerable insight into the message and illustrates earlier comments on the nature of tradition.

Renan argued that the bonds of identity do not flow from the past itself—that is, what actually happened—but from what the community tells one another in the present.[68] To draw on a theme, construction of identity involves both a collective remembering in terms of myths, symbols, beliefs, and legends, as well as a collective amnesia that ignores inconvenient factors that might result in a contradictory narrative. While not totally ignoring the potential black–white divide that provided the principal Tutsi rationale for a quick power transfer to the *mwami* and his High Council, the Bahutu Manifesto stressed a racial rather than an ethnic difference between Tutsi and Hutu. Drawing on the mythology created by colonialism, it called for liberation from the *Hamitic* oppressors—the Tutsi.

The more assertive the Hutu became, the greater the reaction from Tutsi conservatives. In June 1958, 12 members of the *mwami*'s court issued a letter claiming that from ancient times to the present, a fundamental social, economic, and political division had existed in Ruanda and Urundi, the maintenance of which was in the "best interest of all." Compounding the insult, the letter ended by adding an arrogant argument based on the natural rights of the conqueror that denoted Tutsi reliance on the Hamitic hypothesis. It asked a rhetorical question: Since our (Tutsi) kings conquered the lands of the Hutu, killing their little kings (translated more contemptuously as kinglets) and subjugating the Hutu, how can they now claim to be our brothers? To complete the offensive message, the Tutsi elite subsequently rejected land reform because, to reiterate an earlier sentiment, doing so would contravene the "natural order of things," even though that stance affected the *petits* Tutsi as much as the Hutu.[69]

The year 1959 proved pivotal in many ways. The most important events centered on the changing attitudes and allegiances of the Catholic Church and colonial authorities that led to a revolutionary transfer of political power from Tutsi to Hutu. Unfortunately, the transfer occurred along a path that sharpened and reinforced the identities created by colonial occupation rather than muting them. The political situation was more complex than suggested by the mythology that reinforced the Tutsi–Hutu dichotomy. The two identities, Tutsi and Hutu, did not constitute solid unitary political blocs at this point in time or even after the elections in 1960. This does not presume to argue that increasing polarization did not form a primary cause but only to note that debates and divisions continued as the two states moved toward independence. Mamdani argues that to understand the 1959 "revolution," one must "go beyond the Hutu/Tutsi polarization to the ideological contest between different tendencies on each side of the Hutu/Tutsi divide."[70] For the sake of the historical record, one must acknowledge the internal debates because they do frame the perceptions of limits and possibilities held by important players. Nonetheless, from that perspective the story becomes one of avenues not thoroughly explored because events foreclosed alternative paths before they could be thoroughly explored.

The deportation of Chief Bwanakweri did not totally silence those in the Tutsi camp who sought inclusive reform. He returned with Belgian blessings in September 1959 to form a political party—the *Rassemblement Démocratique Rwandais* (RADER) in opposition to the *Union National Rwandaise* (UNAR) formed to promote the interests of the conservative Tutsi elite surrounding the *mwami*. UNAR, in breaking with the Belgian authorities, reached out to form an odd-couple alliance with Communist members of the United Nations Trusteeship Council, upping the pace and intensity of the evolving estrangement with Belgian authorities. The Belgians came to believe that in opposing UNAR they were fighting both the continuation of "feudalism" and the threat of Communism! RADER failed to gain a significant position and influence, serving mainly as a symbol of dissent within the Tutsi ranks.[71]

Within Hutu ranks, the *Mouvement Démocratique Rwandais/Parti du Mouvement et de l'Emancipation Hutu* (PARMEHUTU) grew from the efforts of Grégoire Kayibanda, one of the authors of the Hutu Manifesto and the editor in chief of *Kinyamateka*, a church-owned (Catholic) newspaper. It had the full support of the church, marking a major turnaround in the attitude of the church hierarchy. The other major party, the *Association pour la Promotion Sociale de la Masse* (APROSOMA), claimed also to adhere to Christian (Catholic) doctrine, but in October 1959, the bishops released a harsh critique of APROSOMA's platform, curiously condemning its "spirit of non-Christian racial hatred."[72]

The incident that triggered the sequence of actions that eventually resulted in the displacement of Tutsi officials and their replacement by Hutus occurred in November 1959. UNAR activists attacked a PARMAHUTU leader. Rumors quickly spread that he had died. Hutu activists began gathering their followers to retaliate. The next two weeks witnessed attacks on Tutsi chiefs and property without regard to status. Despite Belgian denial of a formal request to undertake military action in response, UNAR, the party of the Tutsi elite, using the authority of the *mwami*, organized attacks in retaliation. Interestingly, these targeted APROSOMA more than PARMAHUTU.[73]

In the middle of the unrest, a new player, Colonel Guy Logiest, detached from the *Force Publique* in the Congo, arrived to take charge. Logiest brought a new attitude perhaps best expressed in his reflections that he had the "desire to put down the arrogance (haughty airs) and expose the duplicity of a basically oppressive and unjust aristocracy."[74] Belgium declared a state of emergency; the country came under the command of Colonel Logiest. The emergency military action stopped the confrontation from developing into a massive slaughter. Logiest left little doubt about his beliefs as over the next months he proceeded to replace Tutsi chiefs with Hutu chiefs and permitted the beginnings of a new Hutu-controlled military force. The new Hutu chiefs lost little time in reversing the situation in terms of persecution. With the changes in administration, in communal elections held in July 1960, PARMAHUTU easily won the majority of posts by overwhelming margins. The final act occurred in January 1961, when a hastily called assembly abolished the kingship and elected Grégoire Kayibanda president.

The tragedy of the transition is reflected in the March 1961 Report of the United Nations Trusteeship Council:

> A racial dictatorship of one party has been set up in Rwanda, and the developments of the last eighteen months have consisted in the transition from one type of oppressive regime to another. Extremism is rewarded and there is a danger that the [Tutsi] minority may find itself defenseless in the face of abuses.[75]

The transition had simply reversed the relationship—the oppressed had become the oppressors. To return to an earlier theme, the motivating mantra of the new Hutu republic had a very simple premise—Hutus were indigenous, Tutsis were alien—a foreign "race." As a race, they could not be considered as a political minority but rather as resident aliens who could have civil rights but not a right of political participation. In a very short time, the government forced Tutsis from civil service jobs and took over the educational system, previously run by the Catholic Church, adopting policies that severely restricted Tutsi opportunities.[76]

Violence against the Tutsi continued, often with the overt approval of local authorities. Independent estimates of the number of Tutsi deaths from the beginning of the "revolution" in 1959 until the onset of the civil war range between 10,000 and 20,000. By the time Rwanda became independent, surrounding areas (Congo, Burundi, Tanganyika, and Uganda) contained 130,000 Tutsi refugees.[77] Refugees would play an important role in hardening the divide as well as poisoning future interactions with Burundi.

Kayibanda sought to use the 1972 massacre of Tutsis in Burundi to his advantage by playing on the emotional impact to unleash a "vigilance campaign" that reignited ethnic tensions but also caused some other rifts to surface, expanding the discontent well beyond Hutu–Tutsi issues. Unemployment and jobs were the motivating factors in urban areas. In the countryside, other issues, such as domineering officials, had nothing to do with the racial divide. The government seemed powerless to rein in the expanding disorder. On July 5, 1973, General Juvenal Habyarimana engineered a bloodless coup, ending the First Republic.

AFTERMATH IN BURUNDI

The ethnic cleansing in Burundi had decimated Hutu elites. The remainder faced systematic discrimination, reducing them to a servile underclass with little educational or economic opportunities for escape. *Discrimination reinforced a sense of martyrdom that became an integral part of Hutu identity.* The atrocities and following repression indelibly etched the vision of Tutsi as the ultimate evil into Hutu consciousness, especially among the refugees. Crawford Young's description of the situation in Burundi after the genocide provided a grim prediction of future events: "The threat of the servile insurrection, with the essentially contemporary idea of martyred Hutuhood, loomed as an omnipresent menace."[78] The 1959 "revolution" in Rwanda was the crucial consideration in shaping the repressive system. At the back of every Burundese Tutsi's mind, there was always the fear of what would happen if the Hutu did decide to revolt and kill them all. The presence of several hundreds of thousands of exiled Rwandese Tutsi in Burundi contributed considerably to the atmosphere of latent paranoia.

On August 14–15, 1988, an incident in Ntega involving a Tutsi notable—Réverien Harushingoro, who had been involved in the 1972 genocide—touched off an insurrection that quickly spread, with armed gangs of Hutu looting, burning, and killing anyone regarded as Tutsi. The army response was equally brutal, killing women and children and setting fire to houses in reprisal, resulting in perhaps as many as 20,000 dead.[79] Although many returned later, an estimated 50,000 refugees fled across the river border to Rwanda. Unlike the earlier incidents, the international community responded. The European Community called on Burundi to allow international observers to investigate ethnic clashes. Canada called for an independent investigation of Burundi's ethnic violence. The U.S. State Department first denied that the army of Burundi was responsible for initiating the latest cycle of killings then blamed both sides for killing civilians and specifically the army with initiating large-scale killings. As a small country dependent on continuing foreign aid for development, outside perceptions counted. Burundi could not risk ignoring international opinion. In October 1988, Buyoya established a commission that comprised an equal number of Tutsi and Hutu to make recommendations for a plan to foster reconciliation and national unity.

The Buyoya regime faced three challenges—two coup attempts (March 1989, March 1992) and another small Hutu rebellion precipitated by *Parti pour la Liberation du Peuple Hutu* (PALIPEHUTU, founded in a Hutu refugee camp in 1980). Never officially recognized as a party, PALIPEHUTU had nonetheless developed clandestine support networks within Burundi. With the reform and referendum, it became worried about erosion of its support and began to organize public demonstrations, especially in the north where its support was greatest (April 1991). Arrests of PALIPEHUTU leaders triggered an incipient rebellion in several northern provinces, which led to a brutal but quick response that dismantled much of its internal support network. Because leaders now realized that the party was unlikely to be legalized under any circumstances, PALIPEHUTU began to systematically infiltrate the nascent *Front pour la Démocratie au Burundi*. FRODEBU had begun as an underground movement within Burundi in 1983 with origins traceable to Rwandan refugees. It would become officially recognized as a legitimate opposition party in 1992.

The adoption by referendum of the *Charte de l'Unité Nationale* (Charter for National Unity) on February 6, 1991, was the first public test of the new political orientation. On the one hand, by garnering an 89 percent approval, the election seemingly signified overwhelming approval of the liberalization process. On the other hand, the new direction appeared as too orderly, too well organized, and much too controlled by the government to be really an expression of deep-seated and pent-up Hutu popular feelings.[80] A new democratic constitution was adopted by referendum on March 9, 1992.

Grand ideas succumbed to the realities of political competition. One simple fact dominated both the Rwandan and Burundian political context: *by the time of the election, Hutu and Tutsi had wildly different interpretations of their joint historical interaction.* This in itself precluded a productive political dialogue. Open and contentious political campaigns invite mud-slinging and playing to emotions rather than issues. Open dissent through formal channels certainly tests the limits of "the permissible," but low-level processes, particularly in repressive regimes, are often not detected until they produce unexpected outcomes and shattering effects. The problems stemmed from the moderate approach taken, particularly with regard to issues of army democratization and return of refugees. Unfortunately, the expectations of the Hutu electorate for massive and immediate change exceeded any possibilities of realistic fulfillment. Still, Tutsi fears ended the short-lived experiment. On October 20–21, 1993, the army staged a coup, killing a number of prominent government officials. As the news of the deaths spread, so did the outrage.

In this atmosphere, moderates have little leverage because the argument that accommodation and cooperation have not produced meaningful gains has great resonance. Self-interest narrowly defined predominates. Compromise becomes weakness because zero-sum-game reasoning predominates—any opponent's gain is your loss. The simple fact that the stakes comprise a relatively limited set of rewards in the form of patronage and economic opportunity makes the conflict all the more cutthroat. Power-sharing agreements have difficulty in working over time because some group always feels that its rightful demands have not been equitably addressed. Events give credence to the sentiment that the only "good" Hutu or "good" Tutsi is a dead one because the situation seems beyond the power of reason and good intentions to resolve. The violence resulted in an estimated 25,000 to 50,000 deaths, with another massive refugee flight of 800,000 to 900,000 into adjoining countries.[81] The United Nations Commission of Inquiry described the events as "genocide."

A negotiated agreement brokered by the Catholic Church and a special envoy from the United Nations resulted in the Kigobe (January 1994) and Kajaga (February 1994) agreements (accords), which permitted the appointment of Cyprien Ntaryamira (FRODEBU), a Hutu, as president, and Anatole Kanyenkiko (UPRONA), a Tutsi, as prime minister. Groups signed the agreement but had little intention of abiding by it. The agreements and subsequent appointments did little to dampen the continuing violence because the negotiations did not include any of the rebel groups, nor did they attempt to deal with any of the major grievances that had led to the conflicts.[82]

In April 1994, President Ntarimaya had joined President Juvenal Habyarimana of Rwanda on his way home from successful peace talks with the Rwandan rebels in Arusha. The plane crashed just outside of Kigali, killing all on board. The death of Habyarimana would be the event that launched the genocide in Rwanda. The death of Ntarimaya saw the civil war in Burundi become bloodier. Despite a Charter of Government (September 1994) that contained a power-sharing arrangement, the army staged another coup in July 1996, placing Pierre Buyoya back in power. From 1994 to 1996, the violence shifted away from communal mass violence toward armed conflict that perhaps embodied genocidal intent but incidents were at a lower level. By 1998, a military stalemate had evolved that finally was translated into serious negotiations for political change.[83] Peace talks had begun in 1995 with former Tanzanian president Julius Nyerere acting as mediator. Following his death, South African president Nelson Mandela took the lead. In 2000, Buyoya and 13 of the warring Hutu and Tutsi factions signed the treaty, the Arusha Accord (not to be confused with the 1994 Rwandan agreement). Several groups chose to remain active. To bridge the ethnic divide, two major steps would be taken. First, a transitional power-sharing system would be established with presidents holding office for three years. Second, the military would undergo restructuring to achieve equal representation. Peace was not restored in full until August 2008 when the PALIPEHUTU-FNL faction signed a cease-fire.

RWANDA: COUNTDOWN TO GENOCIDE

In comparison with events in Burundi, the Rwandan story after the coup by Juvenal Habyarimana seems relatively straightforward. Tutsis remained politically marginalized. Habyarimana outlawed all political parties except the one he created, the *Mouvement Révolutionaire National pour le Développement* (MRND). As sole presidential candidate, he won two elections (1983, 1988) with 99.98 percent of the vote.[84] The principal difficulties came from the narrow economic base of the economy. Peasant subsistence agriculture contributes little. Cash crops—coffee and tea—tin mining, and foreign aid formed the three essential sectors. During the 1980s, fluctuations in commodity prices affected both the cash crops and tin, actually causing the closure of mining operations. By the end of the 1980s, foreign aid underwrote about 60 percent of the government's annual budget.

Prunier argues that to understand the roots of the genocide, one must understand the nature of elite politics in Rwanda. As incomes dwindled because of shrinkage in private-sector sources, competition to gain or maintain access for shares of the third source, skimming foreign aid, became more intense. Since this depended on having access and influence at the highest levels of government, positions were jealously and ruthlessly protected. The regime had favored individuals from the northwest, particularly those from the areas around Gisenyi and Ruhengeri. Within the rather complex mix of clan, communal, and geographic ties, Agahe Kanzinga, Habyarimana's wife, had more status and a larger support network, known as *Le Clan de Madame*, than he did. Her personal clique, the *akazu* (little house), oversaw the web of political, military, economic, and patronage relationships that comprised Hutu Power.[85] The *akazu*, the inner circle, would play a central role in planning the genocide and Habyarimana's death.

Bringing a climax to the turbulent economic conditions of the 1980s, a combination of climatic hazards (excessive rain, landslides, hail, and drought), fungal diseases, and parasitic attacks combined with government cutbacks in rural assistance produced a major famine that caused a mass exodus to Burundi and Tanzania. The 1989 state budget decreased nearly 40 percent, largely with the "social" ministries taking the greatest cuts.[86] The regime instituted programs of "voluntary labor" to make up for the shortfall in funds, but these caused resentment as well because they appeared little different from the old programs of forced labor. A 1992 UN report highlighting the disaffection warned that it "comes from many grievances against the State and those who enrich themselves conspicuously by diverting public funds or through levies on the generous funds from aid and cooperation."[87] Further, the report noted that if authorities did not move in a serious way to redress the problems, it would cause the opposition to "weld" itself together. As in Burundi (and many other states), the privileged very seldom yield power and position willingly. The situation engenders a vicious cycle: hints of revolt spawn greater repression, which increases dissatisfaction, which generates a greater possibility of overt resistance. When the RPF invaded in October 1990, the Rwandan political system was in crisis.

The end of the Cold War freed the West from the competitive fears that often stifled demands that clients undertake real democratic reform.[88] Under considerable pressure from major donors (including France), Habyarimana announced in June 1990 that he supported a move to a multiparty system. The announcement had multiple consequences in that it set in motion two action plans that, because of their interactive effects, put Rwanda on a path to genocide. In October 1990, the Rwandan Patriotic Front launched an attack across the northeastern border with Uganda. As in Burundi, extremists fed off each other. The attack gave those opposed to liberalization, particularly the *akazu*, a focus and opportunity to put a plan of resistance into motion. They did so by playing the ethnic card—all Tutsis became accomplices and potential fifth-columnists.[89] The rationale for rounding up wealthy and prominent Tutsis stressed the need for vigilance, unity, and action against subversives to protect national security. The regime arrested nearly 10,000 Tutsis over the next two months. The evolution of "Hutu Power (Hutu Powa)" with the promulgation of the Hutu 10 Commandments in December 1990 signaled an escalation of extremist rhetoric that saw extermination as the only real solution to the "Tutsi problem."

From the perspective of the RPF, the announcement of plans for liberalization spurred action as well. They had received reports, readily believed, that the Habyarimana regime no longer enjoyed widespread legitimacy and support outside its northwestern base. Other news, however, could undercut support for violent action. Habyarimana had reactivated plans for a repatriation exercise, and liberalization presumably would provide opportunities for legitimate political parties. If these two initiatives became realities, both possibilities would severely weaken the justifications for a war.

After their participation in his successful insurgent campaign, in fall 1989 Ugandan president Yoweri Museveni had dismissed Rwandans from the Ugandan army (NRA) because of mounting jealousy and fear on the part of Ugandans. Fred Rwigema, former deputy minister for defense, and Paul Kagame, deputy chief of intelligence, both lost their posts. Young members of the Rwandan Patriotic Army (action wing of RPF) militants had still managed to survive and/or infiltrate the ranks. The southwestern Kigezi district of Uganda became the staging area. According to official Ugandan reports, when the time came for action, 3,000 soldiers "deserted," taking their weapons with them.[90] Major-General Fred Rwigema led the invasion force of approximately 2,500. He was killed on the second day of action. Major Paul Kagame was still in the United States, having been sent there for advanced training.

The loss of Rwigema was a major blow, as was the lack of preparation for a long campaign and the lack of support from local sources, but the most important factor was the arrival of French troops. To gain French military support, Habyarimana had staged a fake attack on Kigali, raising fears that the RPA had widespread support. Habyarimana counted on the French desire to maintain influence in the area (contra the British). The French would remain, ostensibly to protect French citizens, until the genocide. The French support would include ignoring the ongoing reprisals against Tutsi by the regime while highlighting RPF/RPA "atrocities." By the end of November, the RPA had retreated back into Uganda.[91] Paul Kagame had returned and assumed command. Organizing his version of the "long march," he led a retreat back into Uganda to regroup. The retreat did not mark the end of resistance but the start of a protracted war" that would play a major role in setting the stage for genocide.

While regrouping, Kagame planned an assault on Ruhengeri for tactical, psychological, and symbolic reasons. The attack on one of the centers benefiting from Habyarimana patronage caused great shock in Rwanda over the evidence that the RPF still lived and had sharp teeth. Still, Mamdani offers a critical insight into the dynamic over the next three years. The problems for the RPF came not from defeat but from the frustrations of victory that brought home the realities of Rwanda domestic politics. Hutu peasants showed no appreciation for being "liberated" by Tutsi forces—they ran away. As the RPF forces advanced, the numbers of the displaced multiplied.[92] At the end of their 1993 offensive, when they had doubled the area under their control, the number of displaced had risen to an estimated 950,000.[93]

The struggle in Rwanda turned out to be very different from that with the NRA in Uganda. The RPF did not introduce an alternate government structure, and after a time, made no efforts to reach out to mobilize the peasants as resources. In fact, the RPF did not try to establish administrative structures in the areas over which they had gained control. The mistrust of the peasants had developed a cynical mistrust in return—the object became control of territory, not of people.[94] The regime had successfully played on the fear that the goal of the RPF was a return to the old days of Tutsi domination and oppression. The RPF did begin to engage in actions that mimicked their extremist opponents.

Organizing Genocide

President Habyarimana had moved forward by announcing in November 1990 that a multiparty system would be allowed with a constitutional referendum occurring in June 1991. He reassured Tutsis that all mention of ethnicity would be removed from identity cards—a promise made just after 300 Tutsis had been massacred in the wake of the October invasion by the RPF. Preparation for the genocide had four related components: central direction, the media, local authorities, and the recruitment and "training" of local militias (*Interahamwe* and *Impuzamugambi*). While some controversy exists over the exact nature of the communication networks, clearly the mechanisms for orchestrating local massacres on cue were in place by the time of the October 1990 invasion. The process became more refined over time. Over the next three years, four massacres took place, each timed to follow a critical point in the war or the negotiations and justify continuation of the status quo. Between October 1990 and April 1994, three more incidents of massive killing of Tutsis occurred (estimated 3,000 total deaths). The crucial questions involve the quantum jump from localized massacres to wholesale slaughter of an entire people.

The media became central to the plan. The *akazu* sponsored a newspaper named *Kangura* (Wake It Up!) that had as its principal mission the demonization of the Tutsi.[95] The paper published the Hutu 10 Commandments. The eighth commandment became a mantra: "Hutus must stop having mercy on Hutus." As part of liberalization, Radio Rwanda, the state-run radio network, was joined on air by a supposedly privately owned station, *Radio–Télévision Libre des Mille Collines* (RTLM, FM 106 on your local dial: 1,000 Hills Free Radio and Television, based on Rwanda's nickname—the land of 1,000 hills), which began broadcasting on July 8, 1993. As Dina Temple-Ralston notes, it was helpful and gave listeners a voice because it encouraged call-ins. Moreover, "in a country where secrets were legion and half-truths told, it seemed that Radio Mille Collines was out of step. It was willing to tell its listeners what was really happening."[96] It used "street slang, obscene jokes and good music to push its racist message . . . [I]t became what one listener at the time called 'a vampire radio' openly calling for more blood and massacres."[97] RTLM actually was the voice of the radical Hutu party *Coalition pour la Défense de la République* (CDR), founded in March 1992. Prunier describes the founders as "on the lunatic fringe of radical Hutu extremism" but "far from being without talent or intelligence."[98] RTLM had one goal: promoting the extermination of the Tutsi. The RPF gained a new sobriquet, the *Inkotanyi* (tough fighters), to dramatize the threat.

Although militiamen played a greater role in the two later ones, Prunier states that the first two massacres were carried out primarily by local peasants. He also asks what he terms a nagging question, but one that stands at the center of any analysis of this particular genocide: How do ordinary peasants become willing participants in killings that serve only elite interests? He sees the answer rooted in four basic factors in Rwandan culture and society: traditional obedience to authority, illiteracy and superstition, trivialization of the tasks, and promise of rewards.

The first two contribute to the process through which the enemy becomes demonized and dehumanized. The combination of the second two explains the willingness to move from belief to overt action. The authoritarian tradition meant that people believed what they were told; illiteracy and parochialism meant they had little or no access to information that might have countered the content of the message from above even if they did have alternative sources. Using the language of rural work placed the tasks in an appropriate context. Add the simple fact that someone had to get the land and livestock after the owners were gone.[99] Then, add the ravages of war into a poor and overpopulated country within the context of the economic situation in Rwanda described earlier. The combination formed some very powerful incentives indeed.

To mobilize and motivate peasants to participate required what Prunier terms "sensibilisation" sessions with central government and local officials that stressed the need to undertake this necessary action to eliminate those who supported the RPF. The actual killing would be done in a special "collective work session (*umuganda*)." He also observes that even during this early period, officials resorted to euphemisms and metaphors as a mechanism to gloss over and mask the nature of the task.[100] The work became "bush-clearing" and "pulling the roots of noxious weeds."

One should note also that the nature of the activities encouraged random killings, banditry, and pillage that had more to do with personal motives than with the ethnic divide. In quarrels between ordinary people, one of the contenders could arrange for a soldier to kill the other, using the easy excuse that the intended victim was an *icyitso* (accomplice). In Rusatira, the burgomaster complained about certain residents of the commune who sought to use the troubled times to bring back the bad habits of vengeance and who confused personal enemies with the enemy of the country, the *Inkotanyi.*[101] Observers have stressed that in a number of instances, "poor versus rich" more than "Hutu versus Tutsi" characterized the nature of the killing. This becomes hard to sort out because in the minds of many Hutu, the rich, if not Tutsi, had become "Tutsified" and thus justifiable targets: "People whose children had to walk barefoot to school killed those who could buy shoes for theirs."[102]

The origin of the *Interahamwe* (those who work/fight together) and the lesser known *Impuzamugambi* (those who have the same goal) yields a familiar story. The organizations started as youth arms of the MRND(D), Habyarimana's reformed and renamed party, and the CDR. They found ready recruits among disaffected students, the unemployed, delinquents, petty criminals, and those with real or imagined grievances. Beginning in 1992, they were taught to kill (and kill quickly) and some were given training in the use of explosives. The *Interahamwe* had committees in every one of Rwanda's 148 communes. Over time, the youth groups evolved first into vigilante bands and then into death squads who spearheaded the Final Solution. To link this with the earlier point about motivation, when the genocide started Prunier observes:

> The social aspect of the killings has often been overlooked. In Kigali the *Ineraha-mwe* and *Impuzamugambi* had tended to recruit mostly among the poor. As soon as they went into action, they drew around them a cloud of poor people . . . and the homeless unemployed. For these people the genocide was the best thing that could ever happen to them. They had the blessings of a form of authority to take revenge on socially powerful people as long as these were on the wrong side of the political fence. They could steal, they could kill with minimum justification, they could rape and they could get drunk for free.[103]

Given the origins of the recruits, despite training, discipline was often poor. Toward the end of the war, the groups became nothing more than bands of armed self-serving thugs as controlling administrative structures, such as they were, broke down. When the genocide began on April 6, 1994, the militias had enlisted 50,000 members.

Beginning in 1990, the regime had also secretly begun to purchase large quantities of small arms from Egypt, South Africa, and China. In particular, China supplied as many as 581,000 machetes, enough to give one to every third Hutu male. The imports had been made easier because the World Bank/IMF had insisted on liberalization of the import license requirements that in turn permitted the use of funds given by donor countries.[104] In the three years prior to the genocide, Rwanda, among the poorest countries in the world, spent an estimated US$100 million on weapons, ranking as the third-largest importer in Africa.[105]

Negotiations, Reform, and Resistance

The interesting aspect of Rwandan politics in the 1990s comes from the connection between the process of democratic reform and the effects of the ongoing civil war. Navigating the transition from 30 years of single party to a multiparty democracy during a civil war seemed akin to taking on the Minotaur's maze. Multiparty competition in this context placed Rwanda in a state of permanent tension and crisis, not the least because of the manipulations of the elite. In anticipation of the new constitution that would open up competition among parties, beginning in March 1991 new parties could register. Interestingly, the most important of the new parties organized along ideological or regional lines. The *Mouvement Démocratique Républicain* (MDR), the largest of the new groupings, was organized along the lines of the old MDR-PARMEHUTU. The new party discarded its original anti-Tutsi program but still stressed its roots in the central region and opposition to the northwestern orientation of the Habyarimana regime. Three other lesser parties, the *Parti Social-Démocratie* (PSD), *Parti Libéral* (PL), and *Parti Démocratie Chrétien* (PDC), which also had aspirations to recruit across ethnic lines, joined with the MDR in a coalition that hoped to end one-party government. Mamdani argues that in the first year after the RPF invasion, the regional question was far more important than the ethnic issue.[106]

The first phase of the democratic movement actually gave Hutu Power the legal space to organize and develop a capacity for independent action that would eventually completely alter the domestic political climate, effectively eliminating any possibility of compromise solutions with regard to the ethnic question. In April 1991, the MRND had officially changed its name to the *Mouvement Révolutionaire National pour le Développement et la Démocratie* (MRNDD). Hardliners argued the case for unity, seeing dissent and negotiation as treason. Under the leadership of Jean-Bosco Barayagwiza, they broke from the MRND and organized a new rightist party, the *Coalition pour le Défense de la République* (CDR). As noted earlier in this chapter, the CDR began to construct its own organs. Successes of the RPF in the civil war, combined with the concerted propaganda campaign that used the advances of the RPF to bolster the case for extermination, eroded any middle ground that might have provided room for compromise. Those favoring a peace that accepted a power-sharing arrangement were characterized as dupes, sellouts, and accomplices. The *akazu* wanted absolute power even if it came at the cost of ruling through a campaign based on fear and terror. After being in a position of absolute power for 20 years, the rise of the RPF threatened not only a change but the possibility that they would have no power at all.

In November 1992, specifically referencing the March 1992 Bugesara massacre, Filip Reyntjens, a Belgian professor of law, and Belgian senator Willy Kuypers held a press conference in Brussels in which they asserted that a network of paramilitary death squads (*escadrons de la mort*) that drew on support from the government and the army existed across Rwanda. The list of alleged leaders read like the guest list for a private dinner party to be given in honor of *Le Clan Madame*: Madame Habyarimana's three brothers, Protais Zigiranyirazo, Séraphin Rwabukumbi, and Pierre-Céllestin Rwagafilita; her son-in-law Alphonse Ntirivamunda; Colonel Théoniste Bagosora; Elie Sagatwa, one of President Habyarimana's brothers-in-law and his personal secretary; and a number of other high-ranking army officers and senior civil servants.[107] Reyntjens contended that the death squads, part of a secret communications network, *Le Réseau Zéro* (The Zero Network), using the tactics of "psychological warfare," had three goals: thwarting the movement to democratization by creating instability through the use of terror, intimidating resident Tutsis and opposition parties, and undermining support for any agreement that might be achieved by the Arusha negotiations.[108] After some exploratory talk in Paris between several opposition parties and the RPF in May and June 1992, the RPF agreed to a cease-fire on July 12, 1992. Formal peace negotiations had begun in August. The sticking point became reorganization of the army. The problems in resolving this issue illuminate Habyarimana's increasingly precarious position. In April 1992, he had instructed the newly sworn-in prime minister, Dismas Nsengiyaremye (MDR), and minister of defense James Gasana (MRNDD), to undertake a major reorganization of the army with the goal of replacing many of the extremists in the top command with moderates. The failure to remove some of the most extreme advocates, such as Théoniste Bagosora, who had very close ties to the *akazu*, yields great insight into the influence of the *akazu*.[109] As the Arusha negotiations progressed, Habyarimana waffled publicly, and MRNDD became more radical in its public statements, indicating some deference of Habyarimana to the extremists.

A power-sharing agreement signed in January 1993 occasioned an outbreak of violence on the day an international commission charged with investigating human rights violations left the country. From an outside standpoint, the agreement seemed an equitable division for a transition government, but the chief negotiator, minister of foreign affairs and cooperation Boniface Ngulinzaire, belonged to the MDR. The CDR and the MRNDD immediately denounced the agreement. An outbreak of violence resulted in 300 deaths and considerable property damage. The RPF resumed its offensive, putting the *Force Armées Rwanda* (FAR) on its heels—it doubled the territory controlled within two weeks. The French decided to send more troops and arrange to supply more arms and ammunition for the FAR (presumably only to protect their citizens), under the premise that Uganda had invaded Rwanda.

Because of overt support for the Habyarimana regime (and the CDR), France bears a heavy burden of responsibility for the genocide. In February 1993, the French minister for cooperation, Marcel Debarge, came to Kigali to encourage a common front against the RPF. Prunier cogently declares: "This call for a 'common front' which could only be based on race was nearly a call to racial war."[110] President Habyarimana immediately began organizing his "common front." At this point, the old American union organizing song "Which Side Are You On?" embodied a salient question to which President Habyarimana might have had an answer that depended on the day or later the hour. The renewed RPF offensive, seemingly breaking the cease-fire, along with reports of RPF atrocities, undercut the moderates. Intraparty quarrels resulted in a situation where one might have had difficulty in sorting out players and their positions even with a detailed scorecard issued weekly.[111]

The Arusha Accords

The Arusha process was characterized by many stops and starts, finally signed in August 1993, but never implemented because the domestic political situation unraveled to the point where the prime minister could not pull together a coalition government to carry out the necessary tasks for transition. Some controversy exists concerning the exact reasons for the lack of acceptance, but at base the assertion that, by the time of signature, the terms of the agreement seemed to confirm for many the proposition that the RPF had won at the conference table what it had not yet won on the battlefield. Bruce Jones argues, however, that the final agreement flowed from the strength of the RPF negotiating position because of its battlefield success. The issues revolved around the RPF's refusal to take the advice from many interested in the outcome that they should not exploit their superior position to extract maximum concessions from the government.[112]

Four issues certainly caused alarm in the Hutu Power camp: the composition of the proposed newly merged army, which gave the RPF a far greater role than perhaps merited by constituency numbers; the attempt to limit the power of CDR and the regime during the transition by giving MRNDD a minority position in the Broad Based Transitional Government; RPF control over the Ministry of Interior, which included the *gendarmerie*; and the repatriation of all refugees. At a symbolic level, the question of RPF refusal to include the CDR in any aspect of the transition during the negotiation or afterward became a litmus test of its willingness to cooperate with the regime within any power-sharing arrangement.[113] Note, however, that although the CDR did not have a formal representative at Arusha, their interests were represented by Théoniste Bagosora, who was part of the negotiating team, and the Rwandan ambassador to Uganda, Pierre-Claver Kanyarushoki, acted as President Habyarimana's personal information pipeline. All things considered, the question became one of continuing the struggle and perhaps losing the war or striking the best deal possible after watching the government's position deteriorate with time.

The RPF wanted the French military withdrawn and a neutral international monitoring force to oversee the transition. Security Resolution 872 (October 5, 1993) established the United Nations Assistance Mission for Rwanda (UNAMIR) with a mandate to assist in ensuring the security of the capital city of Kigali; to monitor the cease-fire agreement and the security situation during the final period of the transitional government's mandate leading up to elections; and to assist with mine-clearance and in the coordination of humanitarian assistance activities in conjunction with relief operations.[114] The UN contingent arrived in November; the French left the next month, after an RPF battalion had been established in Kigali.

When the violence began in April, instead of moving to contain it, after the death of 10 Belgian peacekeepers on the day the violence started, the UN instead chose to pull out, leaving only a shadow force of 270. The UNAMIR commander, General Roméo Dallaire, had harsh words for European countries (France and Belgium) who sent troops to evacuate their own citizens and other Europeans but refused to provide protection for locals. Shortly after the genocide began, the French sent troops that quickly evacuated Madame Habyarimana, her family, and a number of Hutu Power proponents. As the genocide progressed, on April 27, President Mitterand welcomed and praised the foreign minister of the interim government, Jérome Bicamumpuka, and the leader of the CDR, Jean-Bosco Barayagwiza, in Paris. Dallaire would later have a complete nervous breakdown over the carnage and his inability to take any action to intervene.[115]

A Plan Unfolds

President Habyarimana most probably signed his own death warrant with the signing of Arusha. Certainly the withdrawal of the French left him in a very vulnerable position. Hutu Power proceeded to consolidate its position through a concerted media campaign. Violence in Kigali and elsewhere increased with attacks on Hutus as well as on Tutsis that killed all regardless of gender or age with attacks often involving torture and rape. UNAMIR lacked the mandate, the resources, and the operational capability to deal effectively with the escalating violence. Perhaps no incident better describes the exposed and relatively helpless position of UNAMIR than the exchange between General Dallaire and UN headquarters in New York concerning denial of a proposed action to seize caches of stockpiled arms located in Kigali. Malvern summarizes the underlying problem:

> The mission was fundamentally weak: the demands of the US and the UK for a short and inexpensive mission, born out of public humiliation at the Somali debacle, had been largely agreed to, and the US particularly was determined that it should stay that way . . . There were no provisions in the mandate for protecting civilians, collecting illegal arms, or taking action against armed gangs . . . These critical points were left out of the mission largely because of an unwillingness to spend any money and to take any risks.[116]

The question that will always remain unanswered is this: Could early intervention by UNAMIR, acting on received intelligence, have stopped the genocide by forestalling the initial actions in Kigali? If so, would that single action without substantial follow-up have been sufficient to stall the entire operation as it unfolded? Would a more compromising stance on the part of the RPF, resulting in a less demanding set of transition requirements, have made a difference? The short answer to all of these questions is simply, no one knows/ Thankfully, political speculation has no experimental component, so we are spared tests of these hypotheses. The UNAMIR force would remain until formally withdrawn in February 1996.

Other groups began to organize their own militias. Mamdani maintains that even though they closely identified with the Hutu Power movement, Habyarimana and his prime minister were too closely identified with compromise and seeking a middle way. One should note as well that if the earlier Rwanda case dominated Burundi politics, for Rwanda, Burundi presented a real example of life under Tutsi rule. Still, the one man one vote, multiparty reform in Burundi had elected Melchior Ndadaye president and resulted in a Hutu-dominated government. His assassination by elements of the Tutsi-dominated Burundian army (October 1993) produced a huge Hutu refugee flow into Rwanda and other surrounding states at a critical point in the developing Rwandan crisis. The events supplied additional grist for the Hutu Power propaganda machine and recruits for the militias.

The refugee flow from Burundi added to the growing chaos. Consider that this new contingent occurred in addition to the situation in the north where, as noted earlier, RPF advances had already displaced huge numbers. Then, starting in February, Tutsi refugees began returning to Rwanda accompanied by their cattle herds, moving directly into the RPF zone and occupying the land deserted by the Hutus who had fled. Hutu Power claimed, with much validity, that many of these were being recruited into the RPF.[117]

The Genocide Begins: April 6–9

President Habyarimana had flown to Da-es-Salaam for a meeting with the presidents of Tanzania, Burundi, and Uganda about regional concerns. During the course of the meeting, he received a strong message about the necessity of implementing the Arusha Accords from his peers. Because the Rwandan plane was newer, more comfortable, and faster, President Ntaryamira asked for a ride back to Kigali. Several of Habyarimana's closest advisers, and two Burundi government ministers, were also on the flight. As it approached Kigali airport, all lights suddenly went out and two ground-to-air missiles were launched. The aircraft received a direct hit, crashing into the garden of Habyarimana's house near the airport, killing all on board. RTLM broadcast news of the president's death within a half hour of the crash. Radio Rwanda remained neutral, broadcasting only information bulletins. RTLM began calling for blood in earnest.

The *Interahamwe* and *Impuzamugambi* militias mobilized quickly as did the Presidential Guard. Within an hour, the *Interahamwe* had already set up roadblocks and detachments of police, and soldiers working from prepared lists began a campaign of rounding up and eliminating enemies—those Hutus in public life identified with moderate positions—who held positions of power. Anyone who had supported or been involved with the negotiation or promotion of the Arusha Accords topped the lists.[118] The prime minister and the principal negotiator, Boniface Ngulinzira, were among the first killed, along with the president of the Constitutional Court, civil rights activists, journalists, and the leadership of all opposition parties. James Gasana and former prime minister Dismas Nsengiyaremye had fled the country earlier. In the cities, searches went systematically street by street, house by house. Tutsi were killed simply because they were Tutsi, but to be Hutu did not guarantee your safety. Professionals and others with education were killed even if they were Hutu because they were seen as potential opponents. Brazenly, several mass killings took place as peacekeepers had to stand by and watch.

With the death of Habyarimana, Colonel Bagosora took charge. The minister of defense, Augustin Bizimana, and two members of the General Staff, Colonel Aloys Ntiwiragabo and Colonel Gratien Kabiligi, were abroad and the chief of staff had died with Habyarimana. When 16 high-ranking officers convened just after the crash to decide on a course of action, though he was a retired officer, Bagosora insisted on chairing the meeting. Des Forges claimed that although Bagosora ran the meeting, he lacked strong support among those present and was not able to persuade the group to support his first choice for chief of staff nor to have them accept the proposition that the army should take over rather than another civilian government. Subsequently, Dallaire and the senior UN representative Jacques-Robert Booh-Booh both emphasized to Bagosora the necessity of a civilian government.[119]

Outvoting Bagosora was one thing, gaining effective control was another. The Presidential Guard, with the best-trained and best-armed soldiers in the Rwandan armed forces, stood outside the normal command structure. Bagosora reportedly took control of this unit and also had the loyalty of the commanders of the reconnaissance and paracommando battalions, the other two strongest units in the Rwandan army.[120] Together he could count on 2,000 elite troops stationed in and around Kigali, while the forces of his rivals were stationed across the country. When the killings continued, RPF troops came out of their headquarters in Parliament House and engaged the Presidential Guard. With the RPF in the field, those opposed to Bagosora had the possibility of cooperating with them to restore order, and they explored this possibility through the good offices of Dallaire. The senior officers opposed to Bagosora either could not bring themselves to join forces with the long-standing enemy or did not believe that they could lead a substantial number of soldiers into such an arrangement.[121] They looked instead to the international community for support. Such support never materialized.[122] While they dithered, Bagosora acted preemptively. A new interim government was announced on April 8.

Dr. Théodore Sindikubwabo, an elderly nonentity in poor health, assumed the presidency with Jean Kambanda, who lacked national experience, as prime minister. These two were surrounded by new ministers chosen from Butare—the south had arisen while the north was occupied. The interim government presented itself as a legitimate continuation of the previous one, formed under the terms of the April 1992 agreement on power sharing and transition. Anyone aware of the divisions within the parties easily understood that the interim government might have adhered to the letter of the 1992 arrangement, but it completely violated the spirit, representing as it did a single point of view—Hutu Power.[123]

A Lull and Then the Storm

On April 12, the interim government fled to Gitarama, frightened by the rapid advance of the RPF on Kigali. After the first wave of killings, isolated massacres that did result in significant numbers of deaths did occur. The true horror of very large-scale slaughter was still to come. Linda Melvern describes the process in one sentence: "The genocide spread and in some places it settled into a routine."[124] *The efficiency of the operation testifies to the* *amount of advanced planning that had taken place.* It also emphasizes a very chilling and disconcerting point made at the beginning of this chapter—this genocide could not have happened without the approval or acquiescence of a large segment of the population that enabled recruitment and support of a very large number of killers. Those doing the actual killing were not government officials but ordinary peasants. Prunier estimates that *80 percent* of the victims were killed in the six weeks between the onset on April 6 and the third week of May. This would mean that the daily killing rate was at least five times that of the Nazi death camps.[125]

The beginning section of chapter 3 discussed the difficulty that most individuals have of really conceptualizing the meaning of large numbers even with graphic details to support them, such as the Kagera River choked with bodies or 40,000 corpses washing up on the Ugandan shores of Lake Victoria. Nonetheless, General Dallaire gives a vivid picture of the utmost horror encountered in a trip to meet with Paul Kagame:

> Bodies formed a carpet of rags in every direction. We took turns walking in front of my vehicle to make sure that we did not run over any of them . . . Attempting to move bodies out of the way of the vehicle without touching them with our hands was impossible . . . [O]ur hands became more covered in dried blood, in pieces of flesh. It seemed that traces of this blood stayed on my hands for months . . . We had inched our way through villages of dead humans . . . We had created paths amongst the dead and half-dead with our hands. And we had thrown up even when there was nothing in our stomachs.[126]

In Kigali, death toll estimates reached 10,000 a day. Now army officers openly called on civilians to eliminate the enemy and any of its accomplices. As the civil war progressed, the RPF had actually established safe zones for Tutsis within Kigali. This produced an anomalous situation given that the genocide continued in full force in the countryside. Using the reverse logic of Hutu Power, RPF forces began a program of retaliation as they advanced.

Operation Turquoise and the Final Acts

On June 22, 1994, the United Nations Security Council passed Resolution 929 "on establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda."[127] This brought the level of cynicism and hypocrisy to a new high. Anticipating approval, the French had already moved men and equipment onto the border. They entered the country from Zaire (Bukavu) on June 23, establishing Zone Turquoise. The French mission had everything UNAMIR lacked. It still achieved little other than to set up a protective zone that permitted the resurgence of the genocide and the migration of the interim government. The French claimed not to have a mandate to stop the killing. The force, though better equipped, found itself in the same predicament as UNAMIR. The interim government lobbied the French unsuccessfully to retake areas now occupied by the RPF.

Kigali fell to the RPF on July 4, causing an exodus encouraged by the interim government. The RPF took Gisenyi, on the border with Zaire, on July 18. More than 1 million refugees had crossed over into Zaire within a week. Within three months, 10 percent of the population had been killed, and another 30 percent had fled the country. Those still within the country had to deal with the displacement, human tragedy, and devastation caused by the killings and the war: no food, no access to medical care, no utilities, no one to harvest the crops. The new Broad-Based Government of National Unity government officially took office on July 19, 1994. The new government followed the format agreed on at Arusha with some changes. A prominent businessman once part of the Hutu elite, Pasteur Bizimungu, became president. The RPF took all the ministries originally assigned to the MRNDD, and a new post of vice president had been created for Paul Kagame, who would also hold the defense portfolio.[128]

The struggle continued in the refugee camps with Hutu Power still exercising influence. Where assistance had been lacking before to deal with the genocide, countries and humanitarian NGOs now literally could not respond fast enough to provide humanitarian aid to the camps. The horrendous conditions in the camps tended to override previous events—the focus on the sufferings of the present took precedence over addressing the horrors of the immediate past. Attacks on Tutsis in eastern Zaire (Democratic Republic of the Congo) began as did sporadic raids across the border as the FAR regrouped in exile. The camps remained under the political control of those who planned the genocide.

The French representative at Goma (eastern Zaire), Yannick Gérard, insisted that the interim authorities be arrested, but the Foreign Ministry played the "jurisdiction card" again, stating that "our mandate does not authorize us to arrest them on our own authority."[129] When the French government declared that it would not arrest the leaders and planners, the following storm of criticism produced one more cynical self-serving move. Criticized at the UN and elsewhere for protecting persons guilty of genocide, to avoid embarrassment if the new government in Kigali asked for these persons to be handed over to them for prosecution, French authorities warned them to leave the zone quickly. Presumably, according to the French foreign minister, once the interim government personnel understood that they were unwelcome, they left the zone on their own initiative and without French assistance.[130] When their mandate ended on August 21, the French pulled out, leaving chaos and desperation.

At the official end of hostilities, approximately 2.1 million people (out of a postgenocide population estimated at 6.9 million) lived in exile. Another

500,000 displaced by the war lived in camps in the southwest established during Operation Turquoise, and another 500,000 lived wherever the war had pushed them. To add to the problems, there were 700,000 Tutsi who had returned from the diaspora and nearly 300,000 children without parents.[131]

A Short Note on the RPF[132]

In their drive for military victory and a halt to the genocide, the RPF also killed noncombatants in numerous summary executions and in massacres. Although the subject of substantial speculation, the number killed in deliberate RPF massacres of civilians remained poorly documented.[133] Killing did not stop with the formal end of the war. Reyntjens states that during the first half of 1995, the RPA (army) killed "thousands of civilian internally displaced persons."[134] As the magnitude of the slaughter promoted by the *génocidaires* became more widely known, the push to discredit the RPF through *tu quoque* (you did it too!) arguments quickly lost steam. The RPF faced the problem of putting back together a country looted by members of the previous regime as they left, and that still had to live with the fact that "genocide was so intertwined with everyday life that it could be used at every turn to secure an economic advantage, to settle an old grudge or to cover one's tracks."[135]

Other issues surfaced as well. The unity promoted by the common cause quickly unraveled as in the old adage that "winning the war is one thing; administering the occupation quite another." For the most part, the RPF were outsiders returning to a country they really did not know well in a situation where immediate memories poisoned the atmosphere and limited economic opportunities severely constrained the future. Divisions among Tutsis often occurred along "national" lines, reflecting their country of exile. The Catholic Church was of little help in promoting reconciliation. The bishops, if not complicit, had had very close ties to the former regime and seemingly had little remorse.[136] The MDR, the main Hutu coalition partner, issued a critical report in November 1994 that raised important issues, including accusations that the RPF was actually promoting a retaliatory genocide.

Questions of justice dominated. The UN Security Council did authorize the International Criminal Tribunal for Rwanda (ICTY) in November 1994, designed to try the high-ranking architects and organizers.[137] As an exercise in international atonement, it fell far short of addressing the question of what was really needed. The genocide had decimated the judicial system. Prime Minister Faustin Twagiramungu had estimated that 30,000 individuals would be put on trial. The number of detainees would pass the 100,000 mark by 1997. The ICTY had a list of 400 but no means to enforce the warrants.[138] *In 20 years, the tribunal has managed to try 75 cases.*

For the impact desired, the trials needed to be at the pace of the hare, not that of an aged and decrepit tortoise. As Prunier cogently states: "If the whole exercise was to make sense for the ordinary Rwandese population, some people had to hang, and quickly."[139] In this climate, justice delayed really did translate into a widespread perception of justice denied.

CONCLUSION

The conflicts in Rwanda and Burundi sparked the Congolese conflict that still simmers. Changes have occurred, but the question becomes whether they are sufficient to keep another widespread violent conflict from erupting. Moving toward elections in Burundi in June 2015, familiar complaints surfaced. A report late in October 2013 predicted the conflict would escalate: "Exclusion is the order of the day. Ethnicity and region of origin are often considered more important than job skills in accessing employment . . . As it can be expected, such exclusion exacerbates already existing frustrations and divisions in the country's body politic."[140]

In early May 2015, amid reports of judges being intimidated, the Constitutional Court ruled in favor of President Nkurunziza's decision to stand for a third term. Shortly after, while Nkurunziza attended a regional summit in Tanzania to discuss the crisis with other leaders, General Godefroid Niyombare led an unsuccessful coup to take control of the government, causing a postponement of the presidential election for a month. In the aftermath of the coup, paramilitary groups (militias) violently suppressed dissent and protests. In the July election, Nkurunziza gained a third term, ostensibly with 70 percent of the vote.[141] The concern of surrounding states continued. In January 2016, the African Union announced plans to send in 5,000 troops to protect civilians from escalating violence between government and rebel forces. President Nkurunziza threatened active resistance to the deployment of external peacekeepers. According to the United Nations, over 400 people have been killed and another 260,000 have fled the country since the violence broke out over Mr. Nkurunziza's third term.[142]

In these cases, much has changed, but the issues seemingly still turn on what has not changed. Prunier argues that understanding is hard for Western states because contemporary African politics do not mirror contemporary Western conceptions of politics.[143] Boundaries are still arbitrary and porous—identities cross them. There is no idea of an "objective" state that referees the mêlée. States lack legitimacy and solid economic foundations. The state is a resource for those in power, lacking loyalty from those who are not. The idea of a common good to which all contribute has little resonance. For Hutus, Rwanda is again a Tutsi state. Political struggles are not necessarily state struggles because in a situation with weak states and strong, durable, multiple overlapping group identities exist, powerful individuals can play the state for their own and the group's benefit. Finally, the lack of solid economic foundations results in great and widespread poverty, generating opportunities for mobilizing large numbers into militancy if they perceive an economic reward. Violent conflict always lurks just below the surface.

CHAPTER 8

Democide, Ethnic Cleansing, and Other Crimes against Humanity

> Genocide, after all, is an exercise in community building. A vigorous totalitarian order requires that the people be fully invested in the leaders' scheme, and while genocide may be the most perverse and ambitious means to this end, it is also the most comprehensive.
>
> —Philip Gourevich[1]

IDEOLOGY AND REFORMATION

This book began with the almost mind-numbing problem of defining genocide. The length and sometimes convoluted nature of the discussion tends to obscure a simple conclusion—no one term captures the range and variety of mass murders committed over the last 125 years. Cambodia and Darfur are two cases that have produced contemporary judicial proceedings and clearly illustrate the difficulties.

The events in Darfur have generated a great deal of ink and vitriolic exchange devoted to the issue of correct characterization. Gérard Prunier's description of Darfur as "the ambiguous genocide" captures the problems of the debate and the frustrations of its implications for effective action. In July 2010, the prosecutor of the International Criminal Court, after having withdrawn earlier charges of genocide against Sudanese president Omar al-Bashir, issued another arrest warrant alleging a role as an indirect perpetrator or indirect co-perpetrator of genocide in Darfur. This is the first-ever ICC allegation of genocide, and its first indictment of a sitting head of state.[2] Questions abound as to whether the prosecutor has enough evidence to sustain the charges.

The second example, Cambodia, raises equally interesting questions. While the United Nations and Cambodia finally agreed on a court that has a statute permitting trial of individuals involved in the 1975–1979 massacres of an estimated 2 million Cambodians for genocide, the actions taken against Khmer people who comprised the largest proportion of victims do not meet the standards of the legal definition. Only actions directed at resident minorities such as the Vietnamese or Muslim communities would qualify.[3]

To return to the concerns of those who have sought to broaden the definition of genocide, how can we account for deliberate policies pursued by governments that target groups for an ideology or for other reasons that have nothing to do with race, religion, or ethnicity? The chapter heading includes a number of terms defined in chapter 1 with democide being the central focus. Rummel defines the term simply: "Democide's necessary and sufficient meaning is the intentional government killing of an unarmed person or people. Unlike the concept of genocide, it is *restricted to intentional killing of people* and does not extend to attempts to eliminate cultures, races, or people by other means."[4] To reiterate, the definition presumes *intentionality*, thus inadvertent, unanticipated consequences from misconceived policies do not count. Leaders must have known that the selected course of action would result in many deaths.

This chapter will briefly explore three cases that have traditionally fallen outside the definition of genocide but meet the definition of democide: the regime of Mao Tse-Tung (Mao Zedong) in China, the Khmer Rouge (Pol Pot) in Cambodia, and ethnic cleansing in the former Yugoslavia (Croatia/Bosnia/Kosovo). Two of the three cases—Mao and the Khmer Rouge—drew upon variants of Marxist doctrine for justification. The third, Bosnia/Kosovo, while precipitated by the breakup of Communist Yugoslavia, flowed from a combination of ethnic, religious, and nationalist motivations. Eventually, some charges of genocide were brought in the International Criminal Tribunal for Yugoslavia (see chapter 9), but by far, the bulk of prosecutions involved charges of crimes against humanity and massive violations of international humanitarian law (war crimes).

Adam Jones states that the first two cases exemplify the impact of an ideological extremism that produced human destruction "on a scale that beggars belief."[5] The irony here comes from the fact that from the standpoint of Marxist theory, industrialized Germany should have succumbed to the revolution during World War I, but instead Communists came to power in Russia, the least industrialized, least "modernized" of the Great Powers. In his 1994 book *Death by Government*, R. J. Rummel ranked the Soviet Union under Stalin as number one on his list of genocidal governments, with an estimated 62 million deaths deliberately caused by various policies. Interestingly, the Chinese and Cambodian cases also involved predominantly subsistence agricultural economies. The Soviets and Chinese tried to jump-start the process of building Communism by a massive collectivization of agriculture in an effort to generate the capital necessary to support the drive toward rapid industrialization. The goals and vision of the Khmer

Rouge (KR) differed somewhat from the Russian-Chinese model in that the goal of industrialization seemed secondary to that of collectivization as the means of inculcating the peasantry with the fundamental virtues and attitudes essential to the functioning of the perfect Communist society. For the KR leadership, collectivization, while a means, also formed a primary end in itself—the goal being a prosperous *agrarian* commune that could efficiently utilize modern means of agricultural production.

Over the years, the total deaths attributed to the Stalin and Mao eras have been considerably revised. Rummel ranked Mao's China number two, with an estimated 35 million+.[6] Since then, on the basis of new information, Rummel has moved Mao's China into first place with estimates of 65 to 70 million.[7] Hitler holds third place at a total of 21 million, much more than the common figure of 6 million, which only counts Jewish victims. Consider that both the total for the Soviet Union and the revised figure for China comprise a number of deaths equivalent to the current total population of contemporary Germany.[8]

CONSOLIDATING POWER AND BUILDING THE SOCIALIST STATE

For Marx, the idea of nationalism did not exist because he posited a universal interest of workers that transcended all other loyalties, whether tribal, religious, territorial, or national. With the outbreak of World War I, nationalism clearly overrode ideology as socialist parties supported their countries. If one has utopian dreams, the path to utopia certainly does not necessitate using utopian methods. Achieving the ultimate utopia when the state would "wither away" would paradoxically require the building of a strong, unitary state that would undertake the actions necessary to transform the social order. The state would control the economy in order to make the best use of scarce resources and would oversee the education and shaping of the new socialist citizens. The term "totalitarian" describes the process in most literal terms, since no elements of civil society would exist free from state control. The state would completely subsume society, thus presenting the anomalous proposition that in order for it to "wither away," the state would first have to gain total control in order to educate future socialist citizens in the appropriate means of behavior in a society with no state. The Marxian "one size fits all" idea had to cope with the incredible diversity within the Russian Empire that comprised perhaps a thousand different "nationalities."

MAOISM: BUILDING A REVOLUTIONARY PEASANTRY

For many reasons, comparisons of Stalinism in the Soviet Union and Maoism (Mao Tse-Tung/Mao Zedong) in China abound. Both leaders came to power in very poor agricultural countries. Their paths to power were very different, as were their eventual strategies of development. In another paradox, Ben Kiernan points out a difference between the strategy advocated by Comintern (Communist International) for the struggle against "imperialism" in other lesser developed countries and the strategy adopted by Stalin for development in the Soviet Union. In the early 1920s, Comintern promoted the idea of mobilizing peasants in the countryside in a war against landlords, establishing a "dictatorship of the poor peasantry" instead of a "dictatorship of the proletariat."[9] Interestingly, unlike the debate over nationalities policy in the Soviet Union, Lenin argued that societies like the Chinese, with appropriate help, could overthrow "imperialist" control and skip the capitalist stage of revolutionary development.[10] The wretched economic conditions in early-20th-century China left the Chinese Communist Party (CCP) with few choices because the negligible level of industrialization precluded a revolution based on mobilizing an almost nonexistent base of urban factory workers.

China entered the 20th century as a semicolonial state ruled by a weak dynasty (Qing/Manchu) that did not exert effective control over much of its territory. In a story repeated more than once in this book, as in a number of other countries of the era, the dynasty embodied a highly conservative court that resisted any reform effort they saw as weakening their power, status, and economic position.[11] Ordinary Han Chinese who comprised the bulk of the peasantry felt little loyalty to the Qing rulers, who were Manchus from the north. A successful uprising (Xinhai Revolution) led to the declaration of a republic in December 1911, with Sun Yat-Sen as provisional president. The last emperor,[12] six-year-old Aisin-Gioro Pu Yi, formally abdicated the throne in February 1912, ending the Qing Dynasty and China's millennia of imperial rule. General Yüan Shih-k'ai assumed the presidency but died in 1916 after unsuccessfully trying to reinstate imperial rule. His death led to a period of instability known as the warlord era (1916–1928), where military commanders in charge of the regional armies and militias resulting from an earlier army reform effectively controlled large areas of China.[13]

The Kuomintang (KMT, Guomindang) or Chinese National People's Party (Chinese Nationalist Party) dates from the 1911 revolution. After Yüan's death, the party, led by Sun, retained control only in part of the southern area around Guangzhou (Canton) until receiving aid and advisers from the Soviet Union in 1923. Chiang Kai-shek, who would assume leadership of the party after the death of Sun Yat-Sen, spent several months in Moscow for military and political training. The CCP, founded in 1921 by individuals who had embraced Marxism after the victory of the Bolshevik Revolution (1917) in Russia, had had some success in organizing workers and strikes. Not until he joined the KMT did Mao "discover the revolutionary force among the peasantry."[14] At the urging of Comintern agents, the members of the CCP joined with the Kuomintang in 1924 to form a united front. Their long-term goal was to take advantage of the stronger organization and, when possible, act to eliminate the KMT. As Stephen Uhalley notes, unfortunately this was a game played cynically and adroitly by both sides.[15]

In 1927, Chiang Kai-shek, who had succeeded Sun Yat-Sen as leader of the KMT, moved to purge the Communists from the Kuomintang as soon as he returned from his successful campaign against the northern warlords. This began a bloody civil war that lasted for 22 years with significant incidents occurring even in the midst of World War II. In 1931, the CCP had managed to establish control over Jiangxi and Fujian provinces, declaring an independent (but unrecognized) state. The most important event occurred in 1934. Under the leadership of Mao, the Communists had successfully employed guerrilla tactics to offset major campaigns against them by Nationalist (KMT) forces. In preparation for another major campaign in 1934, Chiang had raised a huge force and built fortifications around the Communist positions.

Encouraged by Russian advisers, dissatisfied elements within the party removed Mao as chairman and from the Central Committee. Using more conventional tactics against Chiang's forces resulted in a complete decimation of the Red Army. The remnants managed to break out, leading to the so-called "long march" from the southeastern position up to the northwest (Shaanxi), a journey of some 4,000 miles that lasted a year. Along the way, Mao regained control of the CCP, but starvation, harassment, and skirmishes with Nationalist forces along the way took a huge toll. In one early battle at Xiang after the breakout, the Red Army lost 45,000 men. Only 8,000 to 10,000 of the estimated 85,000 that began the trek survived.[16] The success of the KMT eliminated CCP influence from the south.

Rummel argues that the Nationalists differed little from others involved in the struggle. From their earliest beginnings to their final expulsion to Taiwan in 1949, they killed an estimated 10 million people, more than the total for all Chinese *war* dead from the beginning of the century.[17] In the same time frame, the CCP had several purges of its own but also killed an estimated 3.5 million landlords, rich peasants, intellectuals, bourgeoisie, and others for ideological reasons.[18] Mao declared: "To put it bluntly, it is necessary to create terror for a while in every rural area, or otherwise it would be impossible to suppress the activities of the counter-revolutionaries in the countryside or overthrow the authority of the gentry."[19]

The CCP Takes Control (1949)

During World War II, the KMT and the CCP had formed a tenuous second "united front" to resist the Chinese. After World War II, the CCP Red Army quickly moved into Manchuria. The civil war resumed. The CCP began a process of moderate land reform but by late 1946 realized that peasant support depended on how the peasants perceived land reform. That perception could often be at considerable variance with CCP goals. At the most elementary level, land reform was a simple way to buy the loyalty of the peasants and undermine the authority and power of rural elites. The program bought gratitude but not commitment. New peasant landowners clearly valued their own economic priorities over the common good as defined by the CCP. Political cadres often became enmeshed in local vendettas, and the growth in output barely kept up with the growth in population.[20] At one point, the CCP Central Committee justified its policies by asserting that it was working on reducing, not eliminating, feudal exploitation. This would change radically with the victory that resulted in the Nationalist flight to Taiwan.

Mao declared the existence of the new People's Republic of China on August 1, 1949. Immediately, he initiated a program aimed at leveling the situation in the countryside by eliminating the richer peasants. The program met with violent resistance. The ensuing conflict might have produced in excess of 1 million deaths. The regime never denied the totals and admitted that government security forces had executed 800,000.[21] By 1952, the program of land reform was largely accomplished, according to official pronouncements.

The Great Leap Forward

Mao and others believed that the road to industrialization and economic development absolutely required the collectivization of agriculture. Faced with a situation even more dire than that confronting the Bolsheviks, Mao truly believed that Stalin had proved that collectivization was the correct path to socialist economic development. China had a much smaller industrial base than Russia had in 1917 combined with a larger rural population wedded to even more primitive agricultural methods. Thus, he reasoned that the rationale used by the Soviets applied with even greater cogency to China. The fundamental assumption was that a real surplus actually existed and that the problem was to find a way to capture that surplus to serve the goals of the political leadership. Reforming agriculture then became the key to creating the surpluses necessary to feed an urban industrial base, plus yielding enough for export to earn the hard currency (capital) necessary to fund industrial expansion and modernization. The important economic issue for the Chinese (as for the Soviets before) stemmed from the simple fact that sellers on the international market can demand payment in any currency. Because the yuan was not "convertible" into other currencies at the time, to purchase the needed products from other countries to build industrial capacity, China had to sell its commodities on the international market for convertible currencies that international providers of needed goods would accept in payment.

After the announcement that land reform had been accomplished, Mao had decided that the process of collectivization would follow a gradual path to avoid the errors of the Soviet strategy of implementation. He estimated the process from private ownership to full collectivization would take 15 years.[22] Kenneth Lieberthal argues that Mao failed to realize that the Chinese case differed markedly from the Soviet in that a surplus actually did exist in the Soviet case, whereas the Chinese faced the problem of creating one, then gaining control over distribution: “The problem in agriculture was how to persuade the peasants to increase their output and marketings while Beijing devoted state investment to the heavy industrial sector.”[23]

Three problems arose—two internal, one external. Internally, the first issue became increases in production versus increases in consumption and population growth.[24] The second involved lack of cooperation because peasants pursued their individual self-interests by withholding grain from state-imposed levies, either to hoard as a hedge against future difficulties or to sell on the black market. They slaughtered livestock rather than turn it over to authorities. Externally, the death of Stalin and a deterioration of relations with the Soviet Union hinted at a decline in Soviet support and aid.[25]

In 1955, Mao suddenly called for accelerating the pace of collectivization. He believed, incorrectly, that the majority of peasants desired more rapid collectivization, and he declared the problems came from the rich peasants and lack of proper supervision and motivation by local political cadres. Unbelievably, the task was accomplished in a year with very little bloodshed despite resistance. In his comparative study of Soviet and Chinese collectivization, Thomas Bernstein attributes the reaction to a “sense of resigned inevitability.”[26]

John Keay paints a different picture. At the beginning, the peasants had an incentive in that they enjoyed a short “eat it up” period in that they could actually experience “all the celestial rewards” that had been offered, but not delivered, by past reformist movements.[27] By the end of 1956, 90 percent of the peasantry had been moved onto the collective farms. Almost immediately, the party/state moved to seize 80 to 90 percent of the rural surplus. This confiscation, plus the virtual destruction of peasant handicrafts and traditional markets, drastically reduced peasant incomes. Communal obligations required 12-hour workdays, leaving people with little time to produce or peddle. Due to exhaustion, by the second year almost everyone had given up.[28] Per capita grain consumption in the countryside would not regain pre-speedup levels until the first years of the Deng reforms took hold in the late 1970s.[29] Reality intruded as party moderates persuaded Mao to temper the pace because of massive economic dislocations. The size of collective farms was reduced, unrealistic production targets were revised downward, and compulsory government grain purchases were lowered.[30]

The Hundred Flowers Campaign (1956) encouraged criticism of the CCP and its policies. Mao had expected "constructive" criticism rather than the scathing attacks on the party and its policies that ensued, not only from intellectuals but from the grassroots in the countryside. Rather than taking the criticism to heart, he became convinced that the campaign to purge enemies had not gone far enough. He launched another purge. The "hundred flowers" had bloomed in shades of opinion much too vivid and intense for the taste of the party elite. The purge campaign began by targeting "rightists" but soon expanded to include "an all people rectification that targeted rural cadres and focused on the re-education of the peasantry."[31] Frederick Teiwes suggests that during the period leading up to the Great Leap Forward (GLF), the party walked a tightrope to avoid total alienation of the intellectual elite because they possessed valued technical skills. But the Hundred Flowers experiment raised doubts about the utility of the intellectual community in moving the Communist program forward. On the other side, the sudden "wilting" of the flowers considerably dampened incentives for the intellectual community to engage again. A purge of CCP officials in the provinces began in 1958, vaguely targeting those who had "retreated from socialism."[32]

The GLF had announced that it had two goals: rapid industrialization and the final transformation of society, the same goals as those proclaimed by Stalin. The new initiative applied to all sectors of the economy but obviously focused on a total transformation of the countryside. Plans emphasized the relevance of ideology as an important factor in economic development. Labor-intensive development was viewed as the solution to the problem of capital shortage. Prior efforts at collectivizing farming paled in comparison to the new plan, which reorganized on an even grander scale. The new "collectivization" resulted in massive "people's communes," some of which comprised more than 100,000 people, this time sweeping up those who had resisted by holding back grain or livestock. Agriculture was not the only duty of the communes. Hundreds of thousands were conscripted into work brigades to build infrastructure projects—dams, roads, bridges, and irrigation canals. *The People's Daily*—the official newspaper of the Chinese Communist Party—proclaimed that the GLF would propel China to surpass Great Britain in industrial production in 15 years and the United States in 20 or 30 years.[33]

To meet the goals set, the party mandated unconventional, unproven methods that, in turn, generated impractical expectations of productivity.[34] The 1958 crop seemed to validate Mao's vision, but natural disasters, such as a locust infestation, and a labor shortage caused by the demands for other infrastructure projects meant that the harvest fell short of expectations. Local officials, under pressure from their superiors, declared a bumper crop. The state collected on the basis of these reports, with little regard for the impact on the peasantry. In many regions, officials took almost the entire harvest, leaving little for the peasants. The initiative produced the worst famine in China's long history, perhaps in the written history of the world.[35] As starvation took its toll, yields dropped, even while an estimated 30 to 40 million died from starvation; in the next three years, 1958 to 1960, China continued to be a substantial net exporter of grain. With dramatically reduced yields, even urban areas suffered. However, mass starvation was largely confined to the countryside. The agricultural policies of the Great Leap Forward and the associated famine continued until January 1961.

The death total does not capture the full impact of the policy:

> At about the same time fertility dropped very significantly. The number of births during 1958–62 fell short by about 33 million of the number that would have been expected. Data on food availability demonstrate that the major cause of the demographic crisis was famine. Indeed, measured by the absolute magnitude of its demographic impact—about 40 million excess deaths and about 33 million lost or postponed births—the 1958–61 Chinese famine was the largest in human history.[36]

Add to this the long-term physical damage to the bodies of famine survivors. Ralph Thaxton writes that 25 years after the program ended, the appearance of villagers, particularly those who had endured physical violence, formed a "silent memory": "Victims of the relentless labor assignments . . . saw the socialist state through the damage its cadres had done to their bodies."[37]

The Great Proletarian Cultural Revolution (1966–1969)

The failure of the GLF engendered an internal power struggle in the CCP, not over goals but over methods. More immediately, the party faced a major task in rebuilding its authority in the countryside as well as countering high levels of urban dissatisfaction. For a short period, a moderate faction took control of policy. Mao saw the movement as taking China along the same path that had led the Soviet Union away from socialism.[38] The greatest threats came not from abroad but from the possibility of an internal movement back to capitalism. Hence, the party needed to be purged of revisionists. In unleashing the assault on the party establishment, Mao mobilized the forces that would undermine his own government and result in "a tragedy both for the individual who launched it and for the society that endured it."[39] He initiated a process that he could not control, which led to violence, bitter factionalism, and ultimately chaos.

Mao built his "reform" coalition on three groups: the People's Liberation Army (PLA), radical intellectuals, and a mass base comprised mainly of those elements in urban Chinese society that considered themselves disadvantaged. Under Defense Minister Lin Bao, the PLA once again emphasized political education, using the precursor of the "Little Red Book," a collection of quotations from Mao. The radical intellectuals were associated with Mao's wife, Jiang Qing. Harry Harding characterizes them as playing the role of "court favorites" who perceived that their own careers would be advanced more rapidly through opposition to the system and affiliation with Jiang and Mao. The mass base movement, known as the Red Guard, was recruited from the young and disaffected. It consisted of students who had issues with educational opportunities and workers who felt the system had dealt them an unfair hand. Harding notes that a common pattern existed among these groups: anger against the party establishment by those from bad or middling schools, who "felt their chances for upward mobility were steadily declining, and by those workers who occupied lower positions on the ladder of economic specialization."[40] Recruiting appeals played to the idea that direct action was needed to counter elitism, inequality, and the indifference of a faceless, uncaring bureaucratic system.

The Red Guard movement also fed on the sense of excitement that comes from being called on by a respected leader to perform a vital service for the good of the country and the implicit promise that what they had been called to do would make a difference for each one. Very rapidly the movement took on a momentum of its own. Heeding Mao's summons, millions of young Chinese took to the streets of the country's major cities in the fall of 1966. They ripped down the old signs on shops and avenues, replacing them with such "revolutionary" names as "East Is Red Store" and "Anti-Revisionism Street." They proposed that traffic lights be reversed so that red would mean "go." They invaded the houses of "class enemies" and smashed all that smacked of the foreign, the "bourgeois," the old. They burned Western embassies, ransacked government offices, beat schoolteachers, and humiliated party officials at mass rallies. Chaos enveloped China's cities; in many places, the army had to step in to prevent civil war.[41] Mao complained that the Red Guards had broken up into factions that now engaged each other rather than carrying out the goals of the Cultural Revolution in a principled way.[42] In the end, the PLA, one of the three original pillars of the movement, had to step in to curb the Red Guard.

Looking at the estimates of observers, from 3 to 7 million people died violent deaths.[43] Post-Mao leaders acknowledged that perhaps another 100 million people suffered in one way or another. The widespread phenomenon of mass killings in the Cultural Revolution consisted of four types: mass terror or mass dictatorship encouraged by the government—victims were humiliated and then killed by mobs or forced to commit suicide on streets or other public places; direct killing of unarmed civilians by armed forces; persecutions of traditional "class enemies"; and summary execution of captives. The first three types occurred with the most frequency and can be considered as state-sponsored killings.[44]

Second only to the suffering of individuals was the damage the Cultural Revolution did to all types of institutions. Not only was the party decimated but government ministries and bureaus and, above all, universities and schools, were left in disarray. After the storm of violence had passed, most such organizations remained in a pitiful state because they were run by "revolutionary committees" consisting of the "three-way alliance" of representatives of the People's Liberation Army, veteran cadres, and "revolutionary mass organizations." The resulting instability and problems lasted until the death of Mao in 1976 and the resulting backlash that broke the power of the "Gang of Four."[45]

CAMBODIA: RADICAL PURITY OF PURPOSE

Under colonial rule, the three states of Vietnam, Laos, and Cambodia formed an area labeled French Indochina (Indochine Française) for the intermingling Indian and Chinese culture in the region. Kiernan argues that many of the radical policies of the Khmer Rouge (Communist Party of Cambodia/Kampuchea, CPK) had roots in the occupation by Vichy France during World War II. The ideology of the Vichy government emphasized "authenticity, simplicity, hierarchy, and the return to tradition," to the soil and the homeland, and the construction of a true "national spirit."[46] The influences became an integral part of the world view of Saloth Sar, who would adopt the party name of Pol Pot, and his close associates who shared common experiences in Phnom Penh and later in Paris. Kiernan identifies another influence as well: "Most important, that traditional view of the utility and virtue of farmers and rural life proved surprisingly receptive to the Maoism that was about to engulf first China and then Cambodia, after its independence from France in 1954."[47] The great irony—even though a country boy, Pol Pot never worked a rice field or knew much about life in a rural village.[48] He joined the French Communist Party while studying in Paris.

Pol Pot returned to Cambodia in January 1953, just before it became independent from France (1954). He joined the Indochinese Communist Party, which had united Communist movements in Vietnam and Cambodia. After the Vietnamese victory over the French at Dien Bien Phu that resulted in French withdrawal from Indochina, the party relocated a large number of members to Vietnam. Pol Pot's experiences with the Vietnamese would have major repercussions for policy when the Khmer Rouge gained power—he had felt slighted, ignored, and patronized by the Vietnamese.[49]

Norodom Sihanouk, one of the more intriguing figures in the 20th-century history of Southeast Asia, had taken on the role of head of state in 1960.[50] Sihanouk had fostered the growth of a domestic "movement" he named *Sangkum Reastr Niyum* (People's Socialist Community) to support his policies. Despite its name, the Sangkum had a rather vague and unstructured philosophy that had little relationship to Marxism or any of its siblings or cousins, rather promoting conservative nationalist and religious (Buddhist) values.[51] In foreign policy, Sihanouk attempted to steer a neutralist course in the turbulence that had engulfed the area in the early 1960s. During the Vietnam War, he permitted the North Vietnamese to operate covertly from bases inside eastern Cambodia, and he tried to maintain friendly relations with Maoist China as well as with Kim Il Sung in North Korea. At the same time, he refused aid from the United States, refused to accept the credentials of the newly appointed U.S. ambassador, and finally totally broke off diplomatic relations in April 1965.[52]

Nonetheless, however much Sihanouk might have been open to dealing with Communist countries for reasons of state, and despite the name of his own "movement," within Cambodia, he did not tolerate leftist critiques of his own policy. After riots in 1963, he published a list of "subversives," which included most of the future leadership of the Khmer Rouge: Khieu Samphan, Saloth Sar (Pol Pot), and Ieng Sary. Rather than chance jail or worse, Sar and Sary chose to go underground and fled into eastern Cambodia. Over the next three years, the radical left would suffer constant and sometimes brutal harassment from the chief of security forces, Lon Nol.[53]

From the relative rosy days of 1964–1965, Sihanouk began to encounter a series of challenges at home and abroad. After elections in 1966 and the appointment of Lon Nol as prime minister, Sihanouk organized a "counter-government" composed of leftists to "monitor" the new assembly. The strategy had a very grave downside in that it permitted the resurrection of old factional rivalries. Tensions broke out in 1967 with the Samlaut Rebellion that began in Battambang Province and subsequently spread into surrounding areas over the next year. David Chandler describes the ensuing instability as the product of the ascendancy of the left, the increasing unease of the urban elite, economic woes in the countryside, and the erosion of Sihanouk's influence.[54] The government used brutal tactics to suppress the rebellion. Rummel writes:

> Villages were bombed and strafed; others, including Beng Khtum, Thvak, and Russey Preas, were leveled; some the army first surrounded before massacring all their inhabitants. . . . To assure him [Lon Nol] that his orders were being obeyed, his troops sent severed heads of their victims to him at Phnom Penh. In at least one ghastly case trucks filled with heads, only heads, were dispatched from Battanbang.[55]

As the uprising began, Sihanouk's foreign policy started to unravel as well. He had banked a great deal on China's goodwill. China, engulfed in the throes of the Great Cultural Revolution, seemed uninterested in events in Cambodia. The CPK downplayed their role, but Sihanouk, playing the "Vietnamese card," castigated the "Khmer Viet Minh" who owed allegiance to "an unnamed chief."[56] Lon Nol resigned as prime minister.

New revolts began at the beginning of 1968; this time some were overtly led by the CPK.

In March 1970, Lon Nol, with U.S. support, staged a successful coup to depose Sihanouk as head of state.[57] He repaid the support by permitting a joint U.S.-South Vietnamese invasion of Cambodian territory to destroy the infrastructure of North Vietnamese support for the Viet Cong (South Vietnamese Communists). The casualties from the American bombing of the countryside to eliminate the safe havens for the North Vietnamese gave the Khmer Rouge more propaganda ammunition for recruitment. The KR was able to expand its influence to become a major player in the civil war. By 1973, about 85 percent of Cambodian territory was in the hands of the Khmer Rouge, while the operational capabilities of Lon Nol's army had deteriorated to the point that they had problems in mounting an effective offensive operation. The end of the Vietnam War left the Khmer Rouge in a dominant position. They moved quickly, taking the capital, Phnom Penh, in April 1975. They renamed Cambodia "Democratic Kampuchea." On a per capita calculation, the Khmer Rouge regime would be the deadliest in history. It lasted 44 months and resulted in the death of between 1.7 million and 2.5 million people (*21–25 percent of the population*) from execution, abuse, and starvation.[58]

Sixty years ago, Eric Hofer probed the mind-set of leaders and followers in mass movements in *The True Believer*, arguing that in mass movements, the goals or opinions of individuals are unimportant because the chief goal of a mass movement "is to foster, perfect and perpetuate a facility for united action and self-sacrifice."[59] To do this, leaders romanticize aspects of the past, glorify the future, and pour scorn on the present. By regarding the modern world as contemptible and odious, the struggle becomes a perpetual battle against the present.[60]

The leaders were not wild-eyed fanatics. Karl Jackson says that observers described them as "serious, thoughtful, and intelligent."[61] The mix of dependency theory and Marxism, and the articulation of sovereignty, independence, and self-reliance as goals, does not differ in any significant way from the ideologies espoused by other elites in the Third World at the time. Moreover, their goals were not so different from those associated with Stalin and Mao Zedong discussed earlier in this chapter. The programs of Mao, particularly the Great Leap Forward and the Great Proletarian Cultural Revolution, had furnished the KR with appropriate models.

What marked the KR as unique was their fanatical willingness to pursue their goals no matter the very real costs in terms of economic devastation, human suffering, and potential conflicts with their neighbors. The key to understanding lies in the commitment to a vision and the willingness to bear the costs, whatever they might have been personally or for others, of achieving the desired state. The revolution, properly designed, could engender a radically new political and social consciousness among the people. The KR leadership believed that a total and immediate revolution that would completely transform Khmer social values was unquestionably an achievable goal.[62] This meant not only changing the structure but the minds of the Khmer people by removing all incentives for individual accomplishment. The terror was a necessary means to an end because Pol Pot believed that "only by destroying every root, every vestige of individualist thought could a new society emerge consisting of persons totally dedicated to, and knowing only, a collectivist regimen."[63]

In this endeavor, the KR targeted the young. Kenneth Quinn stresses the importance of focusing on the young: "Pol Pot and his highly educated followers in the Communist Party of Kampuchea relied on the youngest and least literate to impose their programs and policies."[64] They took the very young and taught that the only virtues were discipline and obedience. Sydney Schanberg, a journalist who covered the war, wrote about what he observed: "They do not believe in any religion or tradition except Khmer orders. That's why they killed their own people, even babies, like we might kill a mosquito. I believe that they did not have any feelings about human life because they were taught only discipline."[65]

Only the Pure: "If You Die, It Is No Loss. If You Remain Alive, It Is No Matter."[66]

The quote that introduces this section might have been penned by Mao Zedong, but it precisely encapsulates the attitude of the Khmer Rouge. Adam Jones summarizes some basic principles of Khmer Rouge ideology: peasantism, antiurbanism, and primitivism, purity, and discipline.[67] Instilling these virtues would produce a collective, egalitarian existence that would build a new prosperous, self-sufficient society. Upon securing Phnom Penh, they began to implement a radical program based on Year Zero, or the premise that, starting from scratch, all culture and traditions within a society must be completely destroyed and a new revolutionary culture instituted. Speed was of the essence to deprive enemies of the regime, both internal and external, time to organize a counterrevolution. This ruled out policies of patient persuasion or gradual acclimatization.

Clearly the Khmer Rouge consciously set out to realize the transition to Communism more rapidly and more completely than their Soviet and Chinese predecessors. Valentine concludes that "no drive to transform society has matched the scope, speed and intrusiveness with which the Khmer Rouge thrust their peculiar brand of 'pure communism' on the Cambodian people."[68] If only the pure can build the revolution, one has to be able to define both the pure and impure. The regime had to determine those upon whom it could rely, those who might be reeducated, and those who simply must be eliminated. They developed a simple classification between "base people," those who had been KR partisans or supporters (and hence pure), or lived in KR-dominated areas, and "new people." New people were those who had lived in areas under control of the old regime, any functionary of the old regime no matter how lowly, and city dwellers. The two were totally segregated with no contact between the groups permitted.

Over time, depending on evaluation of one's work ethic, individuals could be moved from one group to the other.[69] Still, as Jean-Louis Margolin observes, more so than either the Soviets or Chinese, the KR believed that class and social origins automatically bred resistance because the traits were genetic and hereditary. This extended to a wide range of groups that seemingly fell under that definition, according to KR ideology.[70] Soon after seizing power, they arrested and killed thousands of soldiers, military officers, and civilians; many of their own soldiers and party members were accused of being traitors. Much of the violence was seen as preemptive.[71]

The first step involved moving approximately 2 million urban residents into the countryside, a strategy that drew on two elements of their ideology: distrust of urban communities because they bred antirevolutionary practices, and the desire to emphasize and enforce an egalitarian ethos. Pol Pot also said: "Our people's traditionally clean, sound characteristics and essence were completely absent and abandoned, replaced by imperialistic, pornographic, shameless, perverted, and fanatic traits."[72] Consider that intellectual communities, the bourgeoisie, and other elites, the quintessential embodiments of individualism, are usually found in urban areas. The KR immediately targeted intellectuals, Western-educated professionals, army officers, royalty, land owners, and skilled laborers. The regime banned all religious worship, destroyed temples, and forced Buddhist monks into the communes as "new people." The removal of the urban population would provide labor for infrastructure projects as well as education in appropriate agricultural skills. Paralleling the moves to eradicate the roots of an urban class society, they also moved to abolish all individual peasant agriculture through immediate communalization of the land. Weitz notes that the "hostility toward any sign of individual property extended so far that even household items like pots, pans, and axes were made common property."[73]

Ethnic Cleansing

The idea of ethnic cleansing took on a stark reality. Hatred of enemies of the people and xenophobic-messianic nationalism resulted in genocidal ethnic cleansing. The Vietnamese, the Chinese, and the Muslim Cham formed the largest minority communities in Cambodia before 1970, totaling about 15 percent of the population. Ethnic Vietnamese were seen as a historic enemy and a betrayer of true Communism by their preference for the Soviet model over the Chinese.[74] The KR played them as a deadly internal subversive threat. The Lon Nol regime had expelled half of the 450,000 Vietnamese during its brief tenure. The KR had begun their purge in areas they controlled even before gaining power. The KR drove out another 100,000 during the first year of their reign. The rest were murdered in a campaign of systematic extermination.[75]

The Chinese and Cham fared little better. Kiernan argues that under Pol Pot's regime the Chinese "suffered the worst disaster ever to befall any ethnic Chinese community in Southeast Asia" in that less than 50 percent survived the four years.[76] The Cham suffered equally. The KR army forcibly emptied all Cham villages, killing at least 100,000, closed their religious schools, and systematically murdered their community leaders. Survivors describe the situation: "They could beat us if they felt like it, even if we had obeyed their laws. There were no laws. If they wanted us to walk, we walked; to sit, we sat; to eat we ate. And still they killed us . . . if they wanted to kill us, they would take us off and kill us."[77]

Purifying the Pure

Some dispute exists over the issues that resulted in the purges beginning in 1977. Did party moderates try to slow the collectivization? Quinn says that that a group of senior military and party officials attempted a coup in September 1976.[78] Many have attributed the differences to a power struggle between the eastern cadres and the Pol Pot group that came from the southwest. Whatever the cause, real or imagined, Pol Pot had diagnosed a "sickness inside the party" that needed immediate action before the "microbes" can spread to do real damage. As noted earlier, through liquidation or forced expulsion, the KR had sought to eliminate Khmer cadres trained by the Vietnamese.[79] In the new purge, the Santebel, or Special Branch of the security service, headed the effort. Comrade Duch, Kaing Khek Iev, presided over the infamous S-21 prison at Tuol Sleng, the site of a former high school in Phnom Penh. One-third of the original cabinet members of Democratic Kampuchea fell victim.[80] Fourteen thousand (documented) died at S-21, but thousands more died across the country. David Chandler notes that "most of those put to death at S-21 were loyal party members."[81]

Ironies of Diplomacy

Khmer Rouge rule came to an end in early January 1979 when a combined force of Cambodian rebels and the Vietnamese army captured Phnom Penh after a short two weeks of fighting. Pol Pot, the KR leadership, and others fled into an enclave in the southwest or to Thailand. Over the next decade, the currents in the international climate at the end of the 1970s produced a shockingly shameful and cynical response. Those in the

West, rather than embracing the fall of a regime denounced as criminal, instead castigated the Vietnamese for the invasion and did a total reversal in then refusing to recognize the new regime in Phnom Penh. Instead they continued to recognize the rump government of Pol Pot that continued to fight a bloody guerilla war in an attempt to return to power.[82]

Not until two years after Vietnamese forces left the country in 1989 did the United Nations approve a settlement plan proposed by Australian foreign minister Gareth Evans. Even then, the plan did not result from any genuine reconciliation among the Cambodian factions: "On the contrary, the Accords had been pressed on them by their respective foreign backers, who had decided that it was time to stop the carnage in Cambodia."[83] Ultimately, elections were held in May 1993 under the auspices of the United National Transitional Authority in Cambodia. In June 2003, the UN and Cambodia agreed to set up a hybrid court, the Extraordinary Chambers of the Cambodia Courts, to try the surviving Khmer Rouge leadership for their deeds

BOSNIA AND KOSOVO: THE BREAKUP OF YUGOSLAVIA

In March of 2016, the *five-year* ICTY trial of Radovan Karadžić, former Bosnian Serb leader produced a verdict. Karadžić, President of Republika Srpska and supreme commander of its armed forces (1992–1996) was found guilty on 10 of 11 counts of genocide, war crimes, crimes against humanity and other atrocities during the war in Bosnia.[84] His indictment charged, among other offenses, that he "instigated, ordered and/or aided and abetted genocide against a part of the Bosnian Muslim and/or Bosnian Croat national, ethnical, and/or religious groups as such," as well as persecutions, extermination, murder, deportation, and inhumane acts (crimes against humanity).[85] Specifically, the charges again Karadžić included responsibility for the execution of 8,000 Muslim men and boys by Serb forces at Srebrenica in 1995, the three-year siege and shelling of Sarajevo, and for participation in a conspiracy to use mass killings and deportations to remove Muslims and Croats from Serb territory—the process often referred to as "ethnic cleansing."

A focus on Karadžić, his Serbian sponsor Slobodan Milošević, and Franjo Tudjman (Tuđman), the first president of independent Croatia (1989), explains much about the genesis of the horrors in Bosnia and how they fit a pattern often repeated. Karadžić has portrayed himself as a heroic Serbian leader. For him, and for the others, the war was not just about power sharing now, it was a war over how the past should be interpreted. He opened the Pandora's box of Yugoslav history, playing on the ghosts and crimes of the past and turning them into the fears of the present.[86] Bell-Fialkoff captures the central factor in explaining an important element: "Nationalism . . . as a kind of modern religion, contains spiritual aspects that lead to its most extreme manifestation, a desire to 'purify' the nation of 'alien' groups."[87]

By the time the 1995 Dayton Accords produced a negotiated peace agreement, besides the dead, the war had resulted in 2 million refugees and a population scarred by acts of unspeakable cruelty—rape, torture, mutilation, and indiscriminate murder. As an important note, the deliberate use of rape as a tactic by Serbian troops and supporters, and the sadistic savagery that followed, resulted in rape being added as a specific offense to the list of crimes included as part of both crimes against humanity and genocide.[88] Sarajevo suffered the longest siege of any city in modern times, spanning the duration of the war. Ten thousand of its inhabitants were killed.

History and Political Perception

During the war, in addition to "ethnic cleansing," the favored phrase of the news media was "ancient hatreds." Yet, this explanation misses the essential point and misreads the historical context. Ottoman rule permitted each religious community (millet) to develop within its own traditions. Conflicts existed, and certainly clashes and conflicts occurred as Ottoman influence in the area waned in the last part of the 19th and early 20th centuries (see chapter 5). The "nations" involved are relatively modern creations with little history of struggles that reflect fundamental animosities between and among them. The importance of any prior "ancient" history, including the "courage and heroic sacrifice" of Serbs in the Battle of Kosovo in 1389, for explaining incidents in the Balkans post 1989 comes less from the intrinsic significance of any single event or set of events than from the political manipulation of them by demagogic politicians and ideologues to generate "patriotic" support for their plans and policies.

The roots do, however, go back to an earlier time when, as Ottoman rule receded, the communities began a process of nation-building. As described by Benedict Anderson, nationalities are "imagined communities" that have deliberately constructed rules of inclusion that may or may not follow certain obvious factors that would seemingly promote the connections essential to belonging.[89] Heroic stories from the past play a great role in building the idea that certain shared experiences and values define a community's unique collective identity.

After World War I, conflicting visions produced tensions in the newly created Yugoslavia, particularly between Serbs, Croats, and Slovenes. As in Africa (and Asia), the borders of the new states created in the aftermath of World War I generated many controversies and concerns reflected in the number of treaties guaranteeing the rights of minorities promoted by the league. The newly created Yugoslavia, though having a Serbian majority, still had incorporated Croats, Muslims, and Slovenes. The three largest self-identified national groups—Serbs, Slovenes, and Croats—had already developed very different views of the past. Serbs saw the state as a reward for their long struggle and sacrifice and hence as a recognition of their right to govern. Croats, Slovenes, and others resisted, leading to constant, ongoing "national" confrontations within the newly created state.[90]

In April 1941, the Axis powers (Germany, Italy, Hungary, and Bulgaria) invaded the Kingdom of Yugoslavia, quickly overpowering the Royal Yugoslav Army. The invaders divided occupation rights. Italy shared Slovenia with Germany and took Dalmatia, Montenegro, and part of Kosovo. Germany placed Serbia under direct military occupation and retained control over a newly created puppet state, the Independent State of Croatia, which comprised most of contemporary Croatia and all of Bosnia-Herzegovina. Macedonia went to Bulgaria; Hungary received parts of Vojvodina.[91] The Germans gave control of the new puppet state to the Ustaše, the Croatian Revolutionary Movement. Throughout the war, members of the Ustaše engaged in a genocidal campaign against Serbs, Jews, and Gypsies that, to that time, had no parallel in the history of southeastern Europe in terms of its scale and brutality.[92]

The Ustaše had functioned as a terrorist organization prior to the outbreak of war. Aleksa Djilas characterizes their ideology as totalitarian, racist, and nationalist based on a strong ultraconservative Roman Catholicism. They sought to construct a greater racially pure Croatia free of Orthodox Christians, Serbs, Jews, Gypsies, Communists, atheists, and others infected with the "Jewish spirit."[93] Interestingly, targets did not include Muslims. Serbs were now considered to be an enemy nation and Orthodox Christianity a target because, just as Roman Catholicism was considered an integral part of Croatian national identity, Orthodox Christianity as a different variant was seen as an integral part of Serbian national identity and a promoter of Serbian interests.[94] Ustaše policy, like that later in Rwanda, mandated that as many sympathizers and supporters as possible should be involved in the operations. Djilas claims that plans called for killing half of the Serbian population and to expel the rest into what remained of Serbia or force them to convert to Catholicism.[95] The Croatians alone might have murdered some 655,000 people, most of them Serbs.[96]

On the other side of the coin, the Četniks formed the Serbian mirror image of the Ustaše. Made up almost exclusively of Serbs, the Četniks used terror tactics against the Croats, the Muslim population in Bosnia, Herzegovina, and Sandžak, as well as the Yugoslav Partisans and their supporters. The Muslim population of Bosnia, Herzegovina, and Sandžak formed a primary target of Četnik terror not only because of a traditional animosity between Serbs and Muslims but also because of a desire and drive to create a "Greater Serbia" free of non-Serbs.

Amid the chaos caused by the invasion on multiple fronts, the Communist Party of Yugoslavia had moved to organize and unite antifascist factions and political forces into a nationwide uprising. The Yugoslav Partisans (National Liberation Army and Partisan Detachments of Yugoslavia), led by Josip Broz Tito,[97] was the third major player in the drama. Četnik massacres and other atrocities met with an equally vicious and bloodthirsty response from the Partisans.[98] With the country experiencing a breakdown of law and order, and collaborationist militias roaming the countryside terrorizing the population, the Partisans came not only to enjoy widespread support but for many were the only option for survival. The Partisans played down Communism in favor of a Popular Front/United Front approach in an effort to appeal to all Yugoslavs. In Bosnia, the Partisan rallying cry was for a country that would be neither Serbian nor Croatian nor Muslim but instead to be free and brotherly in which full equality of all groups would be ensured.

Toward the end of the war, the Partisans began preparing for their future by stepping up the war against their enemies. Among the victims were the usual targets of Communist ideologues: the wealthy, religious leaders, landlords, aristocrats, intellectuals, and "bourgeosie," however defined. The major massacre, however, occurred after the Nazis surrendered in May 1945. Fearing reprisals, thousands of collaborators, Četniks, and Ustašes had fled to neighboring countries now controlled by the allies. Most of these were "repatriated" to face execution by Tito's forces. Rummel estimates that "in the ten months between legalization of the Tito government and the end of the war, Tito likely murdered overall from 300,000 to 750,000 Croats, Slovenes and Serbs as well as German prisoners of war."[99]

Tito's Experimental State

In Tito's postwar construction of the Yugoslav state, we find echoes of the early "nationalities" policy in the Soviet Union. Communism would provide the foundation for a "supranational" Yugoslav culture for a federation of states built on the nationalities that would be national in form but socialist in content.[100] The problems that plagued the Soviet experiment dogged the Yugoslav federation as well. The policies designed to promote nationalist "form" and socialist "content" produced the opposite—governments committed to socialist principles that were increasingly nationalistic in their outlook. Tito tried to juggle and play off one against the other, but over time that policy built up the expectations of rabid nationalists that could not realistically be satisfied within the framework. The two largest nations in the federation, the Serbs and the Croats, increasingly pursued their own very narrow national interests through manipulation of the system. Tito's death (1980) put in place a rotating presidency that in theory gave each nationality equal treatment but also would require extensive negotiation and compromise among them. Instead, the system produced deadlock and a paralysis of the central government.

The emergence of individuals willing to play the "nationalist" card complicated the situation. Tudjman in Croatia and Milošević in Serbia signaled a renewed era of minority persecution. The Serbs sought to validate what they felt to be their just entitlement by asserting a right to control the federation and influence policy toward Serbs in other states.[101] Tudjman led a political movement (HDZ) that explicitly revived Ustaše claims, symbols, and rhetoric that resulted in a campaign of overt discrimination against the relatively large Serb minority in the Krajina region that bordered Bosnia. Kiernan captures an important element that applies to both cases by his reference to "restoring lost history."[102] But then, as states seceded, the simple fact arose that other non-Serb nations did not wish to be in a situation where Serbs would clearly hold most of the political power.

Disintegration and Dire Consequences[103]

In June 1991, both Croatia and Slovenia declared their independence from the federation. An attempt by the Yugoslav National Army (JNA) to invade Slovenia and reverse the decision quickly failed. Perhaps because there were few Serbs in Slovenia and it did not share a border with Serbia, Milošević decided not to press the campaign further. Croatia was another matter. With a population of 600,000, Serbs formed a sizable minority (12 percent). As noted in the last section, the revival of Croatian nationalism had resulted in harassment bordering on persecution of the Serbian minority. Serb-sponsored militias in alliance with the JNA, under the command of General Ratko Mladić, fought for control of Serb-inhabited territory in Croatia.[104] The Serbs managed to set up a puppet government, *Republika Srpska Krajina* (Serbian Republic of Krajina) with Milan Babić as president. The conflict lasted for seven months, with both sides engaging in massacres of innocent civilians and the shelling and deliberate destruction of entire towns. The United Nations approved a peacekeeping operation, UNPROFOR (United Nations Protective Force), in February 1992.[105] The Serbs accepted the plan because they had largely achieved their objectives.[106] The media began to use the term "ethnic cleansing" to describe Serbian operations.

From the end of the first phase of the war in 1991 until the late fall of 1994, the Croats remained far too weak to do anything about the Krajina except express their frustrations as loudly as they could in every international forum. They pursued the U.S.–UN-brokered negotiations but continued to build up their army. By the beginning of 1995, the Croatian government had succeeded in creating a substantial well-armed force of 100,000 soldiers.[107] The subsequent military campaigns, Operation Flash and Operation Storm, directed against the Republika Srpska Krajina, produced one of the most extensive ethnic cleansing campaigns within Croatian territory.[108] Between August 4 and November 15, 1995, a large part of the Serb population in Croatia either fled or was expelled. The operation resulted in a number of indictments by the ICTY, including General Ante Gotovina, who commanded the operations.[109]

Figures for the exact number of Serbs who fled their homes range from 150,000 to 300,000, depending on the source. The Hague Tribunal's indictment of Ante Gotovina cited 150,000–200,000 refugees.[110]

Bosnia

According to the 1991 census, with 43.7 percent Muslims, 31.2 percent Serbs, and 17.3 percent Croats, Bosnia-Herzegovina was the most ethnically diverse of the states and regions that comprised Yugoslavia. Many parts of the republic, especially urban areas, were ethnically mixed.[111] In the first multiparty elections of November 1990 in Bosnia-Herzegovina, the three major national parties that represented ethnic interests had won seats in the National Assembly that more or less reflected their numbers. The three parties agreed to form a coalition government and to share power, but they became deadlocked over the structure of governance. The Serb and Croat leaderships supported plans for "cantonization" into three or more ethnically defined regions, each of which would be dominated by its majority ethnic group: Bosniaks, Serbs, or Croats. The Bosniak leadership resisted; they sought to preserve Bosnia-Herzegovina as a unified, multiethnic, and unitary state.[112]

In anticipation of the results of a referendum to approve a declaration of independence from Yugoslavia, in January 1992, acting on an earlier referendum in which a clear majority of Serbs had expressed a desire to remain part of Yugoslavia, Karadžić declared the Republic of the Serbian People of Bosnia-Herzegovina (later changed to Republika Srpska), which would remain part of Yugoslavia. He also threatened that if Bosnia-Herzegovina declared independence, it "would not last one day."[113] Naimark contends that Tudjman and Milošević had already drawn up plans to divide Bosnia between them, leaving only a small area around Sarajevo for Muslims.[114] Hostilities began following the international recognition of Bosnia-Herzegovina as a sovereign state on April 6, 1992. Sarajevo, the capital city, was itself divided, but Serbian forces also controlled the mountainous area around the city, essentially isolating the part not under Serb control. Over the course of the war, the inhabitants suffered from severe deprivation, with only sporadic aid from humanitarian agencies to sustain their existence. From the positions outside the city, Serb artillery bombarded the area, and Serb snipers shot civilians at random.

When the JNA withdrew from Bosnia in May 1992, they left behind units that had been deliberately manned by Bosnian Serbs along with supporting weapons and ordnance. This gave the Serb army a considerable advantage over the Muslim units. The Bosnian Serb army and associated paramilitaries began a systematic campaign of ethnic cleansing in the Posavina Corridor that linked the western with the eastern part of the nascent Serb Republic and also with rump Yugoslavia.[115] Approximately 70 percent of the expulsions occurred between April and August 1992.[116] The operation included Gypsies as well as Muslims.

Ethnic cleansing does not mean just violence and removal. At its core, it is about terror, humiliation, and punishment for having the ill fortune of being born into the target group and for the effort it will take to "cleanse" an area. It seeks to remove any trace of the identity of the targeted population from an area, including language, history, culture, and family relations. Towns, sacred sites, and city centers were continuously shelled and razed to the ground. The Serbs set up makeshift detention camps that seemingly had no other purpose than to subject those interned to a regimen of constant abuse and degradation. Many had the single objective of systematically detaining Muslim women for rape as a method of total humiliation (dishonor) and terror to force flight.[117] The Commission of Experts established to investigate the situation concluded:

> Based on the many reports describing the policy and practices conducted in the former Yugoslavia, "ethnic cleansing" has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.[118]

To add to the woes, in late October 1992, Croat-Bosniak violence escalated and developed into outright fighting, producing a similar litany of human rights abuses.

Srebrenica

As ethnic cleansing produced waves of refugees and humanitarian plight, the United Nations attempted to establish "safe areas" at Srebrenica, Sarajevo, Tuzla, Žepa, Goražde, and Bihać, deploying a force of 7,500 UN peacekeepers. In July 1995, the Bosnian Serb army overran the Srebrenica and Žepa safe areas, forcing over 30,000 people to flee. In Srebrenica they murdered an additional 6,500 to 8,800 male Srebrenica detainees. The mass killings were the worst atrocity on European soil since World War II.[119] The ICTY issued the first indictments alleging genocide for incidents in Srebrenica. Radislav Krstić, the chief of staff of the Drina Corps, the unit responsible for the massacres at Srebrenica, became the first person convicted of genocide by the ICTY.[120]

Peace: The Dayton Accords

Srebrenica and Operation Storm in Croatia set the stage for a strong initiative from the international community for a negotiated peace settlement. The United States took the lead. When Milošević seemed resistant, North Atlantic Treaty Organization (NATO) carried out air strikes against Serbia in an exercise in coercive diplomacy. Finally, in mid-September, Karadžić agreed to negotiations to end the conflict. The parties met at Wright-Patterson Air Force Base in Dayton, Ohio. The agreement reached (November 21, 1995) by the presidents of Bosnia, Croatia, and Serbia ended the war in Bosnia and outlined a General Framework Agreement for Peace in Bosnia and Herzegovina. It preserved Bosnia as a single state made up of two parts: the Bosniak-Croat federation and the Bosnian Serb Republic, with Sarajevo remaining as the undivided capital city. The agreement brought an end to four bloody years that claimed more than 250,000 lives and caused more than 2 million refugees and displaced persons.[121]

Kosovo

Unlike the other states in Yugoslavia, the autonomous province of Kosovo had experienced ongoing ethnic tensions. More than 80 percent of the population consisted of ethnic Albanians who increasingly resented the domination by the Serb minority, but on the other side, the Serbs feared the rapidly growing Albanian population. Realizing the special place Kosovo had in the myths that defined Serbian identity (Prince Lazar and the battle with the Turks in 1389), Milošević skillfully played on Serbian nationalism, introducing harsh measures against the Albanians, such as replacing all Albanian police with Serb officers.[122] On the other side, the radical Kosovo Liberation Army (KLA) had become increasingly active. The question for Western countries was whether Belgrade was merely trying to deal with an armed insurgency or repeating the ethnic cleansing seen earlier in the decade in Croatia and Bosnia.

James Gow argues that Milošević constantly tested the boundaries, playing cat and mouse. [123] Serbian forces were withdrawn from Kosovo to comply with an October 1998 ultimatum, but gradually, as Christmas approached, ethnic cleansing operations resumed at low thresholds. Testing the boundaries of Western tolerance ended with the incident at Račak in January 1999, when Serb forces allegedly killed 45 villagers, an action that drew the attention of the international media.[124] The United States came to see Milošević as the principal obstacle in resolving the situation without the use of force.

The Serbian government refused to sign the proposed Rambouillet agreement that resulted from a major effort by western European states to resolve the issues through diplomacy. Milošević claimed: "We are defending ourselves. I think we are defending the right to be free and independent, and the right to live in peace."[125] This stance clearly resonated well with his domestic constituency (see chapter 10), but it underestimated the resolve of the West, as much as NATO nations had totally misjudged how the Serbs would react to the initiation of the bombing campaign. On March 20, 1999, the Serbs began a well-planned strike into Kosovo. The picture that emerged formed a replay of events associated with ethnic cleansing in Bosnia: villages were shelled or directly razed and units that entered the villages engaged in murder, rape, torture, and other brutal physical abuse. The beginning of NATO air strikes on March 24 seemingly spurred the determination of the Serbs to quickly finish what they had started. The bombing operation lasted 78 days and itself raised serious questions concerning the legality (and morality) of the tactics.[126] The Serbian military leadership viewed the problem as one of neutralizing "the Albanian terrorist forces quickly" to prevent a massive armed rebellion.[127] By definition, this meant removing a great proportion of the Albanian Kosovar population. More than a million were uprooted before withdrawal of Serbian forces.

As Serbian forces withdrew, the KLA and others took the opportunity to exact revenge on the local Serb (and Roma) populations in their own version of ethnic cleansing that included ethnic Albanians who were thought to have collaborated with the Serbians and attacks on Orthodox churches and facilities. According to the United Nations, Serbia hosts more than 98,000 refugees and more than 227,000 displaced persons.[128] Sporadic outbreaks of violence against Serbs have occurred over time.[129]

The United Nations mounted one of the largest peacekeeping forces in its history, the United Nations Mission in Kosovo (UNMIK).[130] The ICTY issued indictments for Milošević and other high-raking Serbian political and military officials and for two former KLA leaders—former prime minister Ramush Haradninaj and Fatmir Limaj, a former senior military commander in the KLA.[131] Both were acquitted, but Limaj has faced prosecution in a new hybrid court (consisting of both international and Kosovar judges) set up specifically to try alleged offenses during the struggle.[132] Kosovo declared its independence in February 2008 and as of this writing had received official recognition by 106 states. Questions persist about the safety of the Serb minority.

CHAPTER 9

Punishment: Courts, Tribunals, and Other Adjudicatory Methods

> The guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process.
>
> —Anthony Eden (1942)[1]

WHY COURTS AND TRIALS?[2]

Anthony Eden's oft-quoted remark highlights an important question. Given the nature of the atrocities in Rwanda, Bosnia, Sierra Leone, Sudan, the Democratic Republic of the Congo (DRC—formerly Zaire), and Cambodia, in what sense may we speak of appropriate punishment that will secure some rough justice? The sheer scale of genocidal crimes involving thousands upon thousands of killers can overwhelm almost any judicial system. The Pol Pots, Idi Amins, Théoniste Bagosoras, and Slobodan Miloševićs did not act alone. But what tribunal could hope to punish all of the guilty or impose an appropriate sentence for those who planned and facilitated? Thinking in terms of retributive justice, what sentence or series of sentences could possibly balance the scale when guilt involves death and injury to thousands? We tend to think in terms of domestic criminal law systems where the idea that, in some measure, the law applies penalties proportionate to the crime. Occasionally, the issue of proportionality does pop up in domestic law. Trials of sadistic serial killers like Ted Bundy, John Wayne Gacy, and Charles Ng often generate the feeling that no punishment could possibly "fit" the crime. Yet the crimes of the worst serial killers seem insignificant in comparison with crimes against humanity and genocide. There is no such thing as *appropriate* punishment for those responsible for the horrors of Dachau and Auschwitz, or the appalling level of atrocities in Rwanda and Sierra Leone, or the massacre at Srebrenica.

The question of appropriate punishment aside, the arguments for and against trials have several dimensions. An entire new field of inquiry has arisen under the rubric of *transitional justice*, based on the proposition that victims of massive human rights abuses have a right to see the perpetrators punished, to know the truth, and to receive reparations. Transitional justice involves both judicial and nonjudicial measures that have been implemented by different countries in order to redress legacies of massive human rights abuses.[3] In theory, through an emphasis on victims' rights, correctly organized and executed, transitional justice will promote civic trust and support the institutions of a democratic rule of law.

Arguments for transitional justice come mainly from the Western liberal legal tradition. They focus on fairness and due process and the role that bringing at least some of those who committed the most barbarous acts to the bar of justice might play in terms of reconciliation. Advocates argue that prosecution of the individuals responsible for specific acts will avoid the attribution of collective guilt to an entire nation, provide victims with a sense that their grievances have been addressed, and establish an impartial historical record of the crimes and events. Ideally, successful apprehension and prosecution would also serve as a deterrent.[4]

Arguments against tribunals focus on practicality, the nature of judicial process, and the necessities that emerge from diplomatic process. Judges and lawyers operate under entirely different modes of fact determination from the methods employed by those in the political process. In particular, trials by their nature seem an extraordinarily awkward, slow, and unwieldy way to deal with the types of problems presented by genocide. Advocates argue that trials can provide an important historical function by examining and illuminating the details of cases. Opponents argue that because of due process requirements, the trial process can be expensive and proceed at a snail's pace. As the Milošević trial showed, if conducted under standards that meet Western ideas of "fairness," a trial can give the accused a bully pulpit for their views. Courts require proof adduced through application of a very strict set of rules. Such proof may not always be readily available considering the circumstances. Policy makers look for viable solutions that fit the circumstances as they see them at the time.

As the Security Council debated setting up the ICTY, many diplomats had great misgivings about the impact of possible indictments on participants they saw as essential to the peace process leading to the Dayton Accords (Dayton Agreement) because the individuals essential to implementing the agreement were also the individuals most likely to be indicted. In July 2009, the ICC issued its first-ever warrant of arrest of a sitting head of state, accusing President Omar al-Bashir of Sudan of genocide, crimes against humanity, and war crimes committed in Darfur. Gareth Evans, president of the International Crisis Group, summarized how many see the problems:

> The judgment call that the Security Council now has to make is whether Khartoum can be most effectively pressured to stop the violence and build a new Sudan by simply letting the Court process proceed, or after assessing the regime's initial response and continuing to monitor it thereafter by suspending that process in the larger interest of peace.[5]

In this case, diplomats feared that if the Pretrial Chamber affirmed the indictment, the reaction of those in power would undermine the full deployment and operations of African Union/United Nations Hybrid operation in Darfur (UNAMID), hinder humanitarian relief operations, and unravel the shaky North–South peace agreement.

The Sudan case perfectly illustrates the divide between judges and prosecutors on one side and pragmatic politicians on the other. The ICC prosecutor has proceeded with his job, irrespective of the political consequences. Because of the peculiar nature of the Security Council's relationship to the ICC, it will be up to the diplomats to decide if they can live with the consequences (as they see them) of carrying this through.

This taps another downside of judicial process—inflexibility. In the quest to establish a reputation for independence, the ad hoc courts and the ICC struggled to establish their credibility and legitimacy. They have had to seize cases deemed important by observers in a timely manner or be relegated to insignificance from their inception. In December 2015, the International Criminal Court suffered a severe setback in that it had to withdraw an indictment of Uhuru Kenyatta, president of Kenya, for lack of evidence. This case offers an interesting look into the problems of international prosecution. One witness recanted; several simply disappeared. The prosecutor accused the Kenyan government of intentionally hampering investigative efforts by harassing and intimidating potential witnesses.[6]

This discussion so far has ignored reconciliation processes as part of transitional justice strategies.[7] Are processes such as the truth and reconciliation process in South Africa more appropriate in some cases?[8] Archbishop Desmond Tutu, who chaired South Africa's Truth and Reconciliation Commission, summarizes the dilemma: "Ultimately it is Ugandans who have to decide what is best for them. Whatever they choose, it should not hinder reconciliation and healing and yet it should not encourage impunity and hurt the victims yet again."[9] As cogent as this may sound in humanitarian terms, these processes can be as slow, if not slower, than judicial. Reconciliation projects do, in theory, reach more people more directly in that the process requires involvement and dialogue at the grassroots level rather than an often remote judicial hearing that might seem biased if it appears to address atrocities committed by one side only. Because of hardened attitudes, genocides, as in Rwanda and Kosovo, can produce perceptions of winners and losers. Practically, overcoming those attitudes to engender a genuine dialogue has its pitfalls as well. Beliefs do not change, and psychological wounds do not heal, easily. The final assessment of truth and reconciliation projects remains considerably in the future, as does the impact of the ICC.

THE GENESIS OF TRIALS FOR HUMAN RIGHTS VIOLATIONS

The push for retributive justice came in the wake of the carnage caused by World War I. The British and French pushed to try Wilhelm II on a novel and retroactive charge—aggression. Many jurists were appalled. Both the United States and Japan dissented on the basis that international law had no prior prohibition against offenses described as aggression or as against the laws of humanity and that the commission erred in seeking to subject heads of state to trial and punishment by a tribunal to whose jurisdiction they were not subject when the alleged offences were committed. Moreover, no precedent existed for holding an individual responsible for acts of state.[10]

Constantinople Trials

The Armenia genocide also illustrates the potential frustration of insisting on judicial solutions. The British formed the driving force behind the desire to have trials to punish those accused of forcibly deporting and killing Greeks and Armenians resident in the Ottoman state during World War I. They had pressed the new Turkish government to take action against those responsible for the massacre. The pressure resulted in a number of arrests, including some of the most prominent and high-ranking members of the government. Among those detained was Said Halim Paşa, who had served as grand vizier from 1913 to 1917. The government arrested 107 suspects. The arrests generated large-scale unrest within Turkey. The government quickly began prosecution using a special court-martial. The first trials resulted in convictions for Kemal Bey, the provincial lieutenant governor of Yozgart, and Major Tevfik Bey, commander of the police in the same district. Tevfik Bey received a sentence of 15 years at hard labor. Kemal Bey received the death penalty, which the government immediately carried out. The sentences and execution added to the unrest.[11]

The Turkish government did start trials for the more prominent of the others accused, including Said Halim Paşa. Of those in Turkish custody, escapes were common; others were freed. The trials did proceed but in "safe mode." The court tried and convicted Talât and Enver in absentia, and did sentence them to death, but both had asylum in Germany. Many of those in custody in Turkey were acquitted.[12] All criminal proceedings halted when the civil war broke out. Eventually the Nationalist faction led by Mustafa Kemal (later Kemal Attatürk) succeeded in overthrowing the incumbent Ottoman government. In the course of action, the Nationalists had taken 29 British soldiers as prisoners. These became the pawns in a negotiation that led to a trade—the Turks in British custody for the British soldiers held by Kemal. No matter the passion for “justice” for the Armenians, the fate of British soldiers and subjects in the here and now prevailed. Short-term pragmatic concerns based on protecting British nationals took precedence over “justice” for the Armenians. Under the Treaty of Lausanne (Switzerland) in 1923, the British agreed to the trade and also to desist from any further attempts to prosecute those accused.

THE NUREMBERG TRIALS

Most people identify the Nuremberg trials with a single event, the International Military Tribunal (IMT) that prosecuted those responsible for initiating World War II and approving actions that resulted in major breaches of the law of land warfare. For the purpose of this book, that single trial has little relevance other than the London Charter that defined its jurisdiction. Contrary to the belief of many, the IMT did not center on the Holocaust, but the trials after did.

The Nuremberg trials comprised a series of trials (1945–1949) set up to prosecute prominent members of the political, military, and economic leadership of Nazi Germany. For political reasons, the Allies chose the Palace of Justice at Nuremberg, Germany.[13] The first and certainly the best known of these trials was the trial of the major war criminals before the International Military Tribunal from November 14, 1945, to October 1, 1946. The second set of 12 trials of lesser war criminals was conducted under Allied Control Council Law No. 10 (CCL 10) at the U.S. Nuremberg Military Tribunals (NMT):[14]

1. The Doctors’ Trial (December 9, 1946–August 20, 1947)
2. The Milch Trial (January 2–April 14, 1947)
3. The Judges’ Trial (March 5–December 4, 1947)[15]
4. The Pohl Trial (April 8–November 3, 1947)
5. The Flick Trial (April 19–December 22, 1947)
6. The IG Farben Trial (August 27, 1947–July 30, 1948)
7. The Hostages Trial (July 8, 1947–February, 19 1948)
8. The RuSHA Trial (October 20, 1947–March, 10 1948)
9. The *Einsatzgruppen* Trial (September 29, 1947–April 10, 1948)
10. The Krupp Trial (December 8, 1947–July 31, 1948)
11. The Ministries Trial (January 6, 1948–April 13, 1949)
12. The High Command Trial (December 30, 1947–October 28, 1948)

Similar trials were held in the other Allied sectors. In fact, the British Military Court held the first set of trials considerably before the IMT. The

Belsen trials, which dealt with those associated with the Belsen and Auschwitz concentration camps, started in September 1945.[16]

The International Military Tribunal[17]

As an exercise in international justice, Nuremberg illustrates most of the positives and negatives discussed above. Many believe that war crimes trials, no matter how carefully conducted, still represent nothing more than "victor's justice." The Soviet Union participated in the Nuremberg trials even though Stalin was responsible for an estimated 4 million deaths of Soviet citizens and the Soviet army had unquestionably committed a number of gross violations of the laws of war in Eastern Europe.[18]

An important decision provided the basis for the evolution of a future international *criminal* law as distinguished from traditional international law in that the indictments focused on the alleged crimes of individuals rather than on holding Germany guilty (collective responsibility). This provided an important impetus for development of the post–World War II human rights regime as well as the rehabilitation of Germany into an ally. War crimes as defined had always proceeded from the idea of personal responsibility. Other breaches had always been considered the responsibility of the state, not the individual responsibility of those who initiated the breach.

The governments of the United States, the United Kingdom, France, and the Soviet Union concluded the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (August 8, 1945).[19] This instrument, also known as the London Charter, provided the details for the establishment of the International Military Tribunal. The tribunal would consist of four judges, each appointed by a party to the agreement, together with four alternates similarly chosen. The conferees chose Nuremberg as the site for symbolic reasons. It was the location for an annual mass demonstration orchestrated by the Nazi Party and the location where the anti-Semitic Nuremberg Laws had been proclaimed in 1935.

In assessing the negotiations that led to the adoption of the agreement, one should consider the enormous difficulties involved in reconciling the different legal traditions and conceptions represented by the United States and Britain on one hand (common law) and France and the Soviet Union on the other (civil law). These difficulties would face future international tribunals as well. For those constructing an "international" court, these issues form a primary consideration. For example, in civil law procedure, officers of the court system assemble the evidence for both sides, the court conducts the questioning of witnesses, and cross-examination by a defending counsel rarely occurs. Hearsay evidence is permitted as are trials in absentia. Defendants do not have a right to testify on their own behalf.

In contrast, American and British procedures rely on examination and cross-examination in open court as a method of establishing the facts, and defendants have a right to confront their accusers (limits the use of hearsay evidence) and offer testimony on their own behalf. The compromise involved a blend of elements from both systems. The Anglo-American method of examination and cross-examination would be used. Defendants not only could testify on their own behalf, but contrary to Anglo-American practice, they could be compelled to testify by the court. Because the trials would not involve juries, the Anglo-American technical rules of evidence would not apply. The court could consider any evidence it found to have probative value.[20] This included affidavits. The defendants were permitted counsel of their own choosing or could have counsel appointed by the IMT. The charter provided no right of appeal.[21]

Article 6 of the London Charter included the following acts as within its jurisdiction. All generated individual responsibility.

> Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war[;] or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 7 of the charter explicitly excluded the defense of sovereign immunity:

> The official position of defendants whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

The IMT conducted 22 trials over a 10-month period. Twenty-one defendants were in custody when the trials began on November 20, 1945. The defendants raised four major issues: (1) international law applies to the acts of sovereign states only, thus no basis exists for punishing individuals (*nullum crimen*); (2) individuals cannot be held responsible for acts of state; (3) the law applied was *ex post facto* (*nullum crimen*); and, (4) obedience to superior orders, either political or military as a defense or exculpating factor. The court handed down its judgment on September 30, 1946; sentences were pronounced on October 1, 1946. Nineteen of the 22 defendants were found guilty. Three (Schacht, Frizsche, and von Papen) were acquitted. Twelve were sentenced to death by hanging.[22] Only 10 of the 12 defendants sentenced to death were executed. Hermann Göring committed suicide the night before his execution, and Martin Bormann was tried and convicted in absentia.[23] The death sentences were carried out almost immediately on October 16, 1946. The panel exonerated three of the organizations: the SA, Reich Cabinet, and the OKW.

Assessment

In terms of procedural standards, the trials fell well short of the stringent requirements of the modern Anglo-American trials. But the goals here did not include having perfect trials in terms of procedure. The purpose was to mete out a rough justice quickly and publicly. In sum, the principal purpose was perhaps more political than legal. The question is, did the flaws undermine the result? The short answer is no. Sixty years after, few would argue against the view that the trials produced a rough but acceptable justice.

Both the constitution of the IMT and the procedure violated some fundamental standards of due process as defined in common-law adversarial systems.[24] Critics argue that the judges were not impartial, the defense lacked adequate resources (including time),[25] and the rules of evidence were lax. Yet, judges in *criminal* cases are not required to be impartial; *they are required to be fair in judging the evidence as presented and enforcing the procedural rules impartially*.[26] In this case, because judges, not juries, made the decisions on the verdicts, questions relating to the nature of the evidence have less validity. Unlike unschooled jurors, judges should weigh the evidence in terms of logic and consistency in a fair manner.

Did the tribunal apply *ex post facto* law in violation of the *nullum crimen* principle? Crimes against humanity and crimes against peace represented two new categories of crimes. The reasoning of the judges in justifying the jurisdiction and charge of the London Charter relied on both customary law and treaties. The difficulty with both sources stemmed from the fact that no prior treaty or customary usage created individual liability for violations other than war crimes, and no consistent practice supported the few declarations that contained vague provisions that suggested certain activities might have created individual liability. *But then, no defendant was convicted solely on charges that could be considered* ex post facto *law.*

The flaws notwithstanding, the trial stands as a landmark in defining international criminal law. Perhaps the most important advance stems from the definition of a crime against humanity as "an ordinary crime committed on a scale of barbarism unimaginable until the Holocaust."[27] Equally important, it established the precedent that those responsible for the policies and orders, not just the lower-level "grunts" who might have been "just carrying out orders," bear responsibility for their actions. The mantle of "act of state," that is, the mantle of sovereignty, no longer would give an automatic free pass for actions that so flagrantly violated basic standards of humanity. That not every defendant received the death penalty and that some were found not guilty gave the tribunal considerable credibility in terms of weighing the evidence. Questions of procedure and political expediency aside, the trials did not result in any egregious miscarriages of justice.

INCHING TOWARD ACCOUNTABILITY

Despite the mantra of "never again" after the Holocaust, the international community again observed a "not so benign" blindness as the reality of mass killing became "again and again." The horrors that occurred after the end of the Cold War finally forced action. The United Nations Security Council authorized the establishment of ad hoc tribunals for Rwanda (ICTR) and the conflicts in the states of the former Yugoslavia (ICTY). At the same time, the events gave impetus to the movement to set up a *permanent* international *criminal* court that had been envisaged 45 years before with the adoption of the Genocide Convention. The first two ad hoc courts approved by the Security Council were followed by two others: the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Cambodia (ECCC). As of the date of this writing (August 2016), the Security Council has not authorized another ad hoc court.

Despite criticisms and continuing problems, the ICTY and ICTR have managed to try and convict many of those most responsible for the slaughter. These two courts, as the first since Nuremberg, have solidified many aspects of international criminal law. When they began to operate, ICL represented no more than a bare-boned skeleton. The two courts have added considerable flesh and blood to the point of constructing a recognizable body, though one that still displays a number of imperfectly developed limbs. The process, however, has been neither easy nor cheap. Both courts had a sunset plan for ending proceedings by 2010, but the process has dragged on.[28] The last ICTY fugitive, Goran Hadžić, was not arrested until July 20, 2011. His trial commenced in October 2012. The prosecution had concluded its case in late November 2013, but the court suspended the trial in October 2014 due to the ill-health of the Accused. All proceedings were terminated following Hadžić's death on July 12, 2016.[29] The trial of Radovan Karadžić took six years, ending on May 24, 2016 with a verdict of guilty on 10 of the 11 counts in the original indictment. He received a sentence of 40 years. The prosecution and defense have both finished their cases in the trial of Ratko Mladić with the verdict expected in November 2017. The appeals for Karadžić and Mladić will be heard by the Mechanism for International Criminal Tribunals established in 2010 as part of the transition strategy to help wrap up the business of the ICTY and the ICTR.[30] Technically, the ICTY will end with the verdict in the Mladić case. Note however, that the appeals before the MICT will extend the completion date to at least 2019, almost 25 years after the event.

The ICTR delivered its last trial judgment on December 20, 2012 in the case of Augustin Ngirabatware.[31] The MICT upheld the verdict and the 30-year sentence in December 2014. On December 14, 2105 ICTR delivered its final judgment on appeal in the case against former Minister of Family and Women's Development Pauline Nyiramasuhuko and five co-accused.[32] Nyiramasuhuko was the first woman convicted of genocide by an international court. The Security Council officially declared the court closed on December 31, 2015. One outstanding task assumed by the MICT is the tracking and arrest of those indicted who have so far evaded detention. The ICTR still has outstanding warrants for three fugitives: Félicien Kabuga, Protais Mpiranya, and Augustin Bizimana. All were indicted on charges of genocide and crimes against humanity.[33]

ESTABLISHING INDIVIDUAL CRIMINAL LIABILITY

Genocide involves large numbers and crimes committed by many. Courts must find some way to connect individual actions to the broader context. The higher up the ladder of command and responsibility, the more difficult it becomes to fashion the specific links needed to establish *legal* liability. In one very high-profile case, the Trial Chamber of the ICTY acquitted the defendant, noting:

> The Trial Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that the Accused, at any time between their occurrence and up to August 1995, had actual knowledge that murder and cruel treatment had been committed between 27 December 1992 and 20 March 1993.[34]

To reiterate the essential point made earlier, not every offense nor every listed offense committed within the time frame and area of the alleged genocide necessarily qualify as acts considered part of the broader pattern. A murder or a rape might just be a murder or a rape by an individual who took advantage of a situation to even a score or sexually abuse someone. In these circumstances, establishing individual responsibility has its pitfalls given the problem of credible witnesses, access to documents, distance, elapsed time, and lack of specific forensic evidence. The courts have used several theories of liability—command responsibility, conspiracy, joint criminal enterprise, incitement/instigating, and aiding and abetting—to make the connections.[35]

COURTS AND CASES

Almost all of the cases before the ICTR have involved charges of genocide. In contrast, very few trials before the ICTY and none before the SCSL (Sierra Leone) have done so. In large part, this flows from the difference in the statutes that define the temporal (time frame of offenses), territorial (where alleged offenses took place), personal, and material (specific crimes) jurisdiction of each court. Statutes reflect differences in legislative concerns and purposes. Both the ICTR and ICTY Statutes include genocide as a listed crime; the SCSL Statute does not.[36] When the UN Security

Council established the ICTR, the preamble to the resolution authorizing the tribunal specifically voiced the concern that "genocide and other systematic, widespread, and flagrant violations of international humanitarian law had been committed in Rwanda."[37] In the case of the SCSL, the secretary-general explicitly noted that genocide had been excluded from the draft presented to the Security Council because no evidence existed to show that the killing, while widespread and systematic, was directed against any of the protected groups in the convention.[38] The Rome Statute of the International Criminal Court includes genocide as a primary focus.

Prohibited Acts: *Actus Reus*

Just as the convention limits the type of groups covered, it also limits the acts that qualify. Not every offense committed with the requisite intent will result in a charge of genocide. The Genocide Convention (and the ICC Statute) includes five categories of acts. One must keep in mind that genocide forms the *most* heinous international crime. Accordingly, standards of evidence and proof must reflect the gravity of the crime. This observation simply emphasizes the difference between the casual use of the word to describe incidents and the formal criteria necessary to establish genocide as the *crime of crimes* committed by an individual, rather than a war crime, a crime against humanity, or an ordinary crime.

Those who drafted the convention clearly intended to go beyond simple killing or complicity in killing. In assessing Nazi policy in Germany, deliberate killing formed the most obvious aspect of the Holocaust experience, but the focus on killing and the concentration camps tended to overshadow other policies that would have long-term consequences. Note that Table 9.1 includes both *prohibited* and *punishable* acts. In addition to genocide, the punishable list includes, in addition to direct participation in the acts defined as genocide, conspiracy and incitement to commit genocide, attempted genocide, and complicity in genocide. Because these sections of the three statutes have essentially the same language, the following discussion will draw on the statute for the ICTY for examples.

The list of prohibited acts does not differ that much from that which defines crimes against humanity, nor do the operational definitions. In addition to this list, the general elements of criminal responsibility listed in the statutes apply as well. So, planning, instigating, ordering, and aiding and abetting apply here as well.[39] For that reason, the discussion that deals with the operational definitions of specific acts in the previous chapter will serve for this section as well. Their use with respect to genocide will be covered below in the discussion of specific cases.

The same cannot be said of *punishable* acts. The statutes of the ICTY and ICTR directly incorporate Article III of the Genocide Convention. This includes the *inchoate* (incomplete) offenses of conspiracy, incitement, and

Table 9.1
Genocide

Prohibited Acts (*Actus Reus*)

- Killing
- Causing Serious Bodily Harm
- Deliberate Infliction of Conditions of Life Aimed at Physical Destruction in Whole or in Part
  - deprivation of resources necessary to survival
  - enslavement, starvation deportation, persecution
  - forced migration
- Measures to Prevent Procreation
  - forced sterilization
  - forced abortion
  - sexual mutilation
  - prohibition of marriage
- Forcible Transfer/Removal of Children

Punishable Acts

- Genocide
- Conspiracy to commit genocide
- Direct and public incitement to commit genocide
- Attempt to commit genocide
- Complicity in genocide

Source: Schabas, *The UN International Criminal Tribunals,* 162.

attempt. While the statutes of the ICTR and ICTY have a general provision that deals with *complicity* that applies to all crimes, the specification of these elements sets genocide apart from the other crimes in the statutes. The term “inchoate” means that the actions constituting the offense occur prior to, and in preparation for, the acts. An inchoate offense constitutes a crime within itself, meaning that an individual may be convicted of the offense of conspiracy, incitement, or attempt even if the crime of genocide never happens. So, if two or more individuals make plans to rob a liquor store and take some action toward implementation, they have committed the offense of conspiracy even if they never carry out the robbery. Note here that mere negotiations to form a plan do not suffice. Successful prosecution will depend on evidence of an agreement and some *actions* that indicate intent. As a note in passing, no tribunal has issued an indictment for an attempt to commit genocide. No individual has ever been charged with attempted genocide.

In terms of material elements defining genocide, the ICC Statute adds a contextual factor not found in the Genocide Convention, although given the collective nature of the crime, it would seem to form a logical requirement. With respect to each prohibited act, the conduct must take place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[40] Note also that the test has two disjunctive elements. The first makes clear that genocide requires acts that define a clear, well-defined pattern, not just sporadic and isolated occurrences. The second addresses the possibility that the conduct might employ particularly powerful methods, such as the use of weapons of mass destruction. Saddam Hussein's attack on the Kurds in 1988 (the Anfal "ethnic cleansing" campaign), which involved poison gas, illustrates this possibility.[41] Along these same lines, courts have not insisted that one must prove an orchestrated plan, but they have noted that a genocidal campaign might be difficult to carry out without one.[42]

The Mental Element: *Mens Rea*

The targets of the acts matter, but establishing the mental element (*mens rea*) presents a more important threshold requirement. Article 30 of the ICC's provisions on the mental element of crimes states that the prohibited acts must be committed with "intent and knowledge." Because the definition of genocide specifically requires intent, judgments of guilt have tended to conflate intent and knowledge in presuming that the defendant knew destruction of the group would occur in the ordinary course of events.[43] In the appeal of the Krstić conviction for genocide, the ICTY Chamber found that the general lacked the intent to commit genocide but had knowledge that others intended to do so. They reversed the conviction but found him guilty of "aiding and abetting." This seems a bit of legal sophistry somewhat at odds with general assumptions about the elements that define complicity in the common law—*if you knowingly aid and abet, you have intent to commit the crime*.

The intent of the accused must be to *destroy* the protected group "in whole, or in part." Earlier we alluded to the question of scope in determining what *whole* or *in part* means. It depends on, first of all, as noted before, how one defines the *group*, and only then, by what standards? Does quantity matter in the sense of a threshold number or percentage? Or can one use a qualitative standard that focuses on the importance to the group of those killed? While the ordinary person may think of genocide in terms of the Holocaust, the definition goes far beyond defining the crimes in simple numbers. Clearly, the Holocaust serves as the defining incident, but it is only one case. Numbers do matter, but sometimes the numbers can relate to *who* rather than *how many*. For example, systematically killing all men of military age and forcibly removing and raping the women (Bosnia) could have the consequence of eliminating a targeted group.

Rather than looking for an abstract answer, judges have tried to develop standards that adequately take the *context* into account. Two terms have emerged as guides: "substantial," which indicates a quantitative dimension, and "significant," which indicates a qualitative dimension (could also indicate a quantitative dimension).[44] To the question "Does the Muslim community of Srebrenica qualify even though the numbers were relatively small?" the Trial Chamber in the Krstic′ case reasoned:

> The intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group . . . they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.[45]

In this case, the Bosnian Serbs deliberately targeted men of military age, resulting in the deaths of 7,000 to 8,000. The Appeal Chamber′s decision sets out an interesting standard in interpreting what "in part" means. It first found that the action met the specific intent requirement in that its purpose was the destruction of Bosnian Muslims in Srebrenica. Killing the men (and the subsequent forcible removal of the women) would have a long-term consequence for the potential survival of the community. The court then used a cumulative (additive) connection in finding that this qualified as genocide because it formed part of a larger campaign against all Bosnian Muslims.

Nonetheless, tribunals have set the bar here very high. To the consternation of prosecutors and human rights advocates, judges have kept the bar high. The reasoning of the panel in the dismissal of the charges in the *Jelisić* case (ICTY) indicates that convicting low-level players, the Tadićs and Jelisićs, will be very difficult because of the problem of establishing the special intent for participants at this level. prosecutors have to establish that low-level participants had knowledge of the broader context in which the individual actions occurred, or if a plan existed, knowledge of the plan. The Tribunal was constructed to try planners and instigators, not foot soldiers. The Tadić trial happened only because of the imperative of getting the process started.[46] Unfortunately for him, Tadić was in custody in Germany and available. One does not normally spend $20 million to convict a very lowly foot soldier. *Jelisić* had unquestionably committed multiple offenses, but the Court acquitted him on the charge of genocide because prosecutors could not establish that he did so with the necessary intent.[47] At this point, the urge to ensure the widest possible accountability for heinous crimes conflicts with the reality of strict judicial requirements of evidence and procedure.

THE AD HOC INTERNATIONAL CRIMINAL COURTS: YUGOSLAVIA (ICTY), RWANDA (ICTR), SIERRA LEONE (SCSL), AND CAMBODIA (ECCC)[48]

The ICTY and ICTR

The Security Council established both the ICTY and the ICTR, acting under its authority granted by Chapter VII of the Charter of the United Nations. The statutes of the two tribunals share many common elements, particularly with regard to structure and procedures. In drafting the statutes, the secretary-general accepted suggestions proposed by states, individuals, and NGOs, and drew upon the experience of the International Military Tribunal (Nuremberg) and the International Military Tribunal, Far East (Tokyo). To a large extent, the draft charted new legal territory. Remember that no international criminal code existed, then or now, in the sense of a single document that defines violations in detail and specifies the necessary procedural law that would guide fair prosecutions. The few precedents from other national courts provided minimal guidance. Because the Security Council set up the ICTY 18 months before the ICTR, the ICTY Statute had considerable impact on the ICTR as well as on the Rome Statute of the ICC, then in development.

Yet, because they represent responses to quite different factual situations, the two statutes embody very different concerns. Rwanda was primarily an internal conflict, so a different body of law applied (but not a different set of criminal acts as delineated in Table 9.1). When the UN Security Council established the ICTR, the preamble to the resolution authorizing the tribunal specifically voiced the concern that "genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda."[49] The statute authorized the court to try those responsible for acts of genocide and other serious violations of international law within the territory of Rwanda or Rwandan citizens who performed these acts in nearby states. As a result, almost all of the cases before the ICTR have involved charges of genocide. In contrast, very few trials before the ICTY and none before the SCSL (Sierra Leone) have done so.[50] Note that the statute of the SCSL does not include genocide as a crime within its jurisdiction because Kofi Annan, the UN secretary-general, argued that while the situation in Sierra Leone clearly involved crimes against humanity, it did not meet the explicit criteria for genocide as defined in the Genocide Convention.[51]

Unlike the ICC, the ad hoc courts are set up to carry out a specific task, not permanent institutions. As bodies established by the Security Council (SC) under Chapter VII, they will cease to exist with a decision by the SC that international peace and security have been restored. This contrasts with the ICC and the ICJ which constitute permanent institutions whose jurisdiction and authority stem from international agreements (treaties) accepted and ratified by states. Although creations of the Security Council, the ad hoc courts (and their prosecutors) operate as independent agencies. The SC does not control their agendas, but this does not mean that politics does not affect certain operations. In theory, these ad hoc courts have an advantage in that as subsidiary organs of the SC, UN member states have an obligation to carry out any decisions that require enforcement action. In fact, as noted, states have consistently ignored this obligation until it became inconvenient. Second, because the ad hoc courts depend upon the Security Council to authorize monies for operations, they have suffered from chronic under-funding, but also from states not paying their assessments to support the courts.[52]

ICTY (Former Yugoslavia)[53]

Yugoslavia began disintegrating in 1991, but the international community was extremely slow in its reaction. In October 1992, the UN Security Council voted to establish a five-member commission of experts to investigate war crimes in the former Yugoslavia. The commission faced both financial and political problems in carrying out its task. M. Cherif Bassiouni, who chaired the commission, noted that the UN did not provide sufficient funding "to ensure that the Commission would not interfere with the ongoing peace negotiations."[54] The commission had to raise money from other sources to fund its investigation. On the other hand, Bassiouni notes that the commission "was given the broadest mandate of any Commission since Nuremberg."[55] It took full advantage of the mandate. The commission submitted the longest report in Security Council history: 3,500 pages and 300 hours of videotaped interviews and other evidence.

Other UN agencies had joined in the investigation as well. The Commission on Human Rights convened a first-ever special session. The statement broke new ground in referring to concern about the possibility of genocide in Bosnia and Herzegovina. This contrasted with the reluctance of the Security Council to use the "g" word. The United States did press for the creation of a "Nuremberg-like" court.[56] The commission had appointed a special rapporteur who issued a report that said, "There is growing evidence that crimes have been committed."[57] Regardless of the conclusions in the report none of the permanent members of the Security Council seemed to have any great interest in bringing the issue to discussion until media reports detailing the carnage began to appear and influence public opinion. Even then, many questions remained. Diplomats working to resolve the crisis were dead set against trials because they believed the threat of prosecution would deal a severe blow to efforts to negotiate a settlement.[58] This involved an interesting irony in that many of those who could be accused of committing or condoning serious crimes were seen as necessary players in resolving the conflict.

Other questions related to the authority of the Security Council to establish a court of any type given the ambiguities of its jurisdiction to deal with internal conflicts. Note that this is a separable issue from that addressed in the Tadić trial (later in this chapter) where the question became "Do certain aspects of international humanitarian law apply to internal conflicts?" This issue turns on the interpretation of what types of incidents affect *international* peace and security to the extent that Article 2.7 (the domestic jurisdiction clause in the UN Charter) does not rule out action by the SC. These may seem small quibbles, but to a large extent "good lawyering" depends on defining such quibbles to benefit one's client.

Issues of Authority and Jurisdiction

The establishment of the two courts broke new ground. The United Nations had affirmed Nuremberg and its results in an *ex post* resolution, but the IMT was not its creation. The question of whether or not the Security Council had the power to create an ad hoc court was by no means clear-cut. Article 29 of the UN Charter seemingly gives the SC broad powers: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions." Article 41 provides in addition that

> the Security Council may decide what measures *not involving* the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[59]

Reading Article 41 as a permissive list in the sense that the included actions are meant to be suggestive rather than exhaustive would underscore the authority to establish any entities deemed necessary to the work of the SC. Additionally, a 1954 ICJ advisory opinion had upheld the right of the Security Council to establish subsidiary bodies, including tribunals.[60] The technical problem lay in the fact that the court would not be wholly an SC operation. The General Assembly would elect the judges, and the secretary-general would nominate the prosecutor. Extended negotiations finally made the arrangements palatable.

Only in February 1993 did the Security Council by Resolution 827 establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).[61] It took a year for the court to get up and running. Judges had to be elected, a site selected, facilities acquired, and rules and procedures developed and written. Not until November was a special (chief) prosecutor named.[62] Even at that point, establishment of the court seemed a token gesture. Gary Bass concludes, "NATO had the troops. In all of The Hague's early difficulties, the fundamental hurdle was the West's refusal to take military action against war criminals in ex-Yugoslavia."[63] While prosecutions began, not until 1998 did the political climate really support the tribunal. It took a courageous and principled political decision by the United Kingdom's prime minister, Tony Blair, to jump-start an active pursuit of those indicted.

Structures and Cases

The two courts divide into Pretrial Chambers (that assess the evidence for a possible indictment), Trial Chambers, and Appeals Chambers. Trials do not involve juries. A three-judge panel presides over each trial. Each trial panel must have a minimum of two permanent judges. The ICTR and ICTY tribunals share an Appeals Chamber. In theory, this should ensure the development of consistent practice. Each Appeals Chamber consists of 10 permanent judges appointed by the president of the court from the permanent judges of the two courts and five from the permanent judges of the International Criminal Tribunal for Rwanda. The Appeals Chambers have their seat at The Hague in the Netherlands.

Initially, the ICTY and the ICTR shared the Office of the Prosecutor (OTP). This did have the advantage of ensuring a uniform prosecutorial policy for the two tribunals, but the workload and practical problems led the SC to establish a separate Office of the Prosecutor for the ICTR in 2003. Headed by the chief prosecutor, the OTP operates independently of the Security Council, of any state or any international organization, and of the other organs of the two courts. The OTP has the responsibility of investigating incidents, collecting evidence, identifying witnesses, and preparing cases for trial. The structure includes a deputy prosecutor for each tribunal. The registry, headed by the registrar, administers the everyday business of the court. The office is responsible for all communications to, and from, the court. Along with the president of the court, the registrar is also responsible for a number of diplomatic functions.[64]

The ICTY and ICTR have authority to prosecute four clusters of offenses: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed on the territory of the former Yugoslavia since 1991. Unlike Nuremberg, the two courts have jurisdiction only over natural persons, not over organizations, political parties, or administrative entities. The ICTY and ICTR have concurrent jurisdiction with national courts over serious violations of international humanitarian law committed in the former Yugoslavia and Rwanda,[65] but the international courts could claim primacy over national courts and take over national investigations/proceedings at any stage if they consider that doing so would prove to be "in the interest of international justice."[66] As part of their completion strategies, both the ICTY (13) and the ICTR (10) have transferred some defendants to local courts.

The ICTY charged only a few individuals with genocide. The first, Goran Jelisić, was a low-level participant who had the nickname of the "Serbian Adolf." He pled guilty to 15 counts of crimes against humanity and 16 counts of violations of the laws or customs of war relating to murders, beatings, and the plunder of private property in the municipality of Brčko in the northeastern part of Bosnia and Herzegovina in May 1992. He fought the charge of accomplice to genocide. The Trial Chamber acquitted him on the charge. The chamber found that, given the evidence, genocide had not occurred in Brčko. It is impossible to be an accomplice to a crime that others have *not* committed. The Appeals Chamber found that the Trial Chamber had made an incorrect assessment of the evidence on the genocide count, but it did not reverse the acquittal. Jelisić received a 40-year sentence.[67]

Radislav Krstić was chief of staff of the Drina Corps of the Army of Republika Srpska (VRS) and then its commander during the time of the Bosnian Serb take-over of the United Nations safe haven of Srebrenica in July 1995. He was convicted of genocide, violations of the laws or customs of war, and crimes against humanity. On appeal, the chamber upheld the Trial Chamber, finding that genocide had occurred in Srebrenica. It also found that the main staff of the VRS clearly had the specific intent to destroy a significant part of the Bosnian Muslim population. However, it reduced the charge of committing genocide to aiding and abetting on the basis that Krstić *lacked the specific intent* necessary to be a direct perpetrator. The court used the theory of *joint criminal enterprise* to link Krstić to the crimes. This permitted the use of circumstantial evidence to establish the connection. In reducing the charge, the panel reasoned that the standard for direct participation was much higher—it required "unequivocal proof" of intent (see Table 9.2).[68]

Table 9.2

Status of Workload (August 15, 2016)

COURT	INDICTED	CONVICTED	AT TRIAL	ACQUITTED	OTHER*
ICTY	161	86	1 ICTY 2 MICT	19	51
ICTR	93	61	0	14	18

*indictments withdrawn, transferred, terminated by the death of the accused, or fugitives still at large

ICTR (Rwanda)

As with the fighting in Yugoslavia, the violence in Rwanda attracted attention, although the UN was slow to act in ways other than expressing concern. The Security Council condemned the violence by calling for those involved "to respect fully international humanitarian law."[69] On July 1, 1994, the UN Security Council asked the secretary-general to appoint a commission to accumulate evidence of war crimes in Rwanda. After copious supporting material on the massacres had been secured, on November 8, 1994, the Security Council, acting on its authority under Chapter VII of the charter, adopted the Statute of the International Tribunal for Rwanda.[70]

Interestingly enough, the biggest obstacles eventually came from the new Rwandan regime. By happenstance, Rwanda was serving a two-year elected term on the Security Council at the time the violence began. Initially, the new Rwandan government pressed for an international tribunal modeled on the ICTY. As negotiations wore on, it became increasingly negative toward the idea. According to UN personnel, the negativity stemmed from several factors—the realization that the tribunal could not possibly undertake the prosecution of the thousands of detainees then in Rwandan prisons, the severe limitation put on the temporal jurisdiction of the court (only offenses committed between January 1 and December 31, 1994), the decision not to locate the tribunal in Kigali, the lack of an independent Appeals Chamber (would share with ICTY), and the prohibition on capital punishment.[71] In the end, Rwanda voted against the Security Council resolution approving the establishment of the court. Shraga and Zacklin conclude that the reason for the negative vote stemmed from the realization by the government that the tribunal would not be responsive to the wishes of the government.[72] With all of the political maneuvering, the following case still set an important precedent. Table 9.3 provides a summary of the first case ever prosecuted for genocide.

SPECIAL COURT FOR SIERRA LEONE[73]

The Special Court for Sierra Leone differs from the ICTY and ICTR in that it was created under the *joint authority* of the government of Sierra Leone and of the United Nations to try those accused of violations of international humanitarian law (and the law of Sierra Leone) within the territory of Sierra Leone since November 30, 1996.[74] Because of the nature of its structure, combining both international and national elements, it is often characterized as a *hybrid* court. The court consists of two Trial Chambers and an Appeals Chamber. Each Trial Chamber consists of three judges, two selected by the UN secretary-general and one by the government of Sierra Leone. The Appeals Chamber has five judges, two nominated by the government of Sierra Leone and three by the secretary-general of

Table 9.3
The Prosecutor of the Tribunal Against Jean Paul Akayesu

Allegations of Fact[*]

Jean Paul Akayesu served as mayor of the Taba commune (prefecture of Gitarama, territory of Rwanda) between 1 January 1994 and 31 December 1994.

The indictment alleged that Akayesu knew that the acts of sexual violence, beatings, and murders were being committed and that he was at times present during their commission. Further, it was alleged that he facilitated the commission of the sexual violence, beatings, and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of these activities, and by failing to prevent them, he encouraged these activities.

Charges and Defense

The indictment charged Akayesu with 15 offenses that included genocide, complicity in genocide, direct incitement to commit genocide, and various crimes against humanity (as defined in the Statute of the court). During the trial the defense argued that Akayesu was a "scapegoat," who found himself accused only because he was a Hutu and a mayor at the time of the massacres.[†]

Verdict

The Chamber found him guilty on 9 of the 15 counts named in the indictment. These included genocide (murder) and crimes against humanity (rape, torture, and extermination). He received a sentence of life in prison.

[*] Drawn from, *Prosecutor v. Akayesu*, Indictment [Case no: ICTR-96-4-I]; http://69.94.11.53/ENGLISH/cases/Akayesu/indictment/actamond.htm.

[†] James C. McKinley, Jr., "U.N. Tribunal, in First Such Trial Verdict, Convicts Rwandan Ex-Mayor of Genocide," *The New York Times* (September 3, 1998).

the UN. Judges serve three-year terms. While both the ICTR and ICTY Statutes include genocide as a listed crime, the SCSL Statute does not. In the case of the SCSL, the secretary-general explicitly noted that genocide had been excluded from the draft presented to the Security Council because no evidence existed to show that the killings, while widespread and systematic, were directed against any of the protected groups in the convention.[75]

The prosecutor issued 13 indictments in 2003. He subsequently withdrew two of those indictments in December 2003 because the accused had died. The Special Court for Sierra Leone was the first international court to be funded by voluntary contributions and, in 2013, became the first court to complete its mandate and transition to a residual mechanism (Residual Special Court for Sierra Leone).[76]

The tribunal brought 10 persons to trial. Two others died, one before proceedings could commence (Revolutionary United Front leader Foday Sankoh) and one outside the jurisdiction of the court (RUF battlefield commander Sam Bockarie). A third (African Forces Revolutionary Council chairman Johnny Paul Koroma) fled Sierra Leone shortly before he was indicted. While some evidence suggested that Koroma is dead, he is still officially listed as at large. One person (Samuel Hinga Norman) died during the course of his trial, and proceedings against him were terminated. The others were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years.

The Special Court for Sierra Leone was the first international tribunal to try and convict persons for the use of child soldiers (AFRC trial), for forced marriage as a crime against humanity (RUF trial), and for attacks directed against United Nations peacekeepers (RUF trial).[77] With the conclusion of the Charles Taylor trial, the tribunal also provided *the first conviction of a sitting head of state by an international court*.[78] As a note about costs for later discussion, the outlay for the Taylor trial alone exceeded US$20 million.[79]

CAMBODIA/DEMOCRATIC KAMPUCHEA (EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA)[80]

Twenty years after the invasion by Vietnam ended the genocide, the General Assembly of the United Nations finally passed a resolution that sought to punish the main leaders of the slaughter and offered assistance to the Cambodian government.[81] A report by experts recommending the creation of an international court and the setting up of a truth commission was rejected by Cambodia, which argued that it was an unacceptable interference in its sovereignty. Finally, on March 17, 2003, the United Nations reached a draft agreement with the Cambodian government for an international criminal tribunal, the so-called Extraordinary Chambers in the Courts of Cambodia (ECCC), to try former Khmer Rouge leaders.[82] The ECCC's temporal jurisdiction, namely the period of time within which the alleged crimes would have had to have occurred, covers the time from the beginning through to the end of the Pol Pot regime: April 17, 1975, to January 6, 1979. The Cambodian and international judges, co-prosecutors, and co-investigating judges were sworn into office in July 2006, at which time the co-prosecutors began their preliminary investigative work in earnest.[83]

Another hybrid court, the structure of the ECCC parallels that of the SCSL in that it also has Pretrial, Trial, and Supreme Court (Appeals) Chambers, but because of the legacy of French jurisprudence, the court operates under slightly different rules. Two co-investigating judges (one Cambodian and one international) perform the functions normally done by a Pretrial Chamber (Article 5). The Pretrial Chamber is to be convened, and its judges to serve, only if and when needed, in order to settle differences between the co-prosecutors or between the co-investigating judges and to hear pretrial appeals if the investigating judges cannot agree on an indictment (Article 7). International judges are appointed by the Supreme Council of the Magistracy of Cambodia from lists of candidates provided by the UN secretary-general. The nominees not selected are to remain available for appointment as international judges in the event of a vacancy. Judges have no set terms, presumably serving for the working life of the court (Article 12).

The tribunal has faced many delays in its work due to political interference by the Cambodian government, corruption, and funding problems.[84] Two judges have resigned in protest over perceived political interference by the Cambodian government in halting prosecutions.[85] The General Assembly had directed that the expenses of the ECCC must be borne by voluntary contributions from the international community. The extremely slow start meant that many of those who would have been tried have died in the interim. These include Pol Pot, Son Sen (defense minister and responsible for the Santebal, the political police), Yun Yat (minister), Thiounn Thioeunn (minister), Ieng Sary, Ta Mok (chief of military command), and his deputy Ke Pauk.[86]

Funding has been a continual problem. For example, the budget request for 2013 was $35.4 million, split into an international component of $26,005,100 and a national component of $9,360,300. An evaluation of the situation by an interested NGO found:

> The consistent challenge with ECCC budgets has been raising the money necessary to fund them on a timeframe that meets the needs of the court. For instance, in 2012 the court faced a crisis when funds for the international side of the budget ran dry, resulting in a hiring freeze and a risk that contracts of existing staff would not be renewed when they expired. To date the contributions to the international side of the budget for 2013 are sufficient to fund operations through June 2013.
>
> There is an ongoing dispute between donors and the RGC about who should supply the funds for the $9.3 million allocated as the Cambodian share of the overall budget. . . . The RGC argues that it cannot afford to provide any additional funds, and that international donors must, as they have in the past, contribute funds to pay Cambodian salaries and other line items in the Cambodian budget. In contrast, international donors and UN officials are requesting that the Cambodian government increase its contribution to the budget as a show of support for the court . . . [N]o funds have been available to pay the majority of Cambodian staff, who have been working without pay since the beginning of December 2012.[87]

Funding continues to rest on shaky grounds.

In July 2010, Kaing Guek Eav (known as Comrade Duch), the first Khmer Rouge leader to be tried by the ECCC, was convicted of crimes against humanity, murder, and torture. Comrade Duch served as commander of security prison S-21, where at least 14,000 people were tortured and killed. He originally received a sentence of 35 years' imprisonment, reduced by 16 years for time served and illegal detention under Cambodian law. Both the prosecution and defense appealed the sentence. In February 2012, the ECCC extended his sentence to life imprisonment.[88]

In August 2012, the court found an additional two defendants, Nuon Chea (88) and Khieu Samphan (83), guilty of crimes against humanity, murder, and extermination.[89] This was just the first phase of the trial because the Court had split charges to enable efficient handling. Nonetheless, the first phase of the trial lasted 222 days, included testimony from 92 individuals and 166,500 pages of written evidence and has raised the issue of cost versus presumed effects, given the limited scope of the trial verdict.[90] It took the ECCC more than eight years and upward of US$200 million to get to this point. The second phase concluded in August 2014 with a second set of convictions for crimes against humanity.[91] The tribunal might fade away simply because of the age and health of the defendants. There is a high probability that many of those left will die or be declared incompetent to stand trial.

THE INTERNATIONAL CRIMINAL COURT[92]

Tracing the history of efforts to construct the International Criminal Court involves following two separate tracks: the effort to draft an international criminal code and initiatives for an independent international court. In November 1947, the General Assembly charged the International Law Commission with two tasks: first, to formulate the principles of international law recognized in the charter and judgment of the Nuremberg tribunal; and second, with careful attention to these principles, to prepare a draft code of offenses against the peace and security of mankind.[93] The creation of the court was tied to other negotiations then in progress. During the preparatory work, which produced the Genocide Convention, representatives from the United States pushed hard for inclusion of language authorizing the creation of an international tribunal.

Delegates from the Soviet Union, among others, expressed major reservations.[94] Unlike the International Court of Justice, where jurisdiction was limited to disputes between countries, proponents of the International Criminal Court envisioned a court that would assert jurisdiction directly over individuals for certain crimes not otherwise punished in national courts. Article VI of the convention emerged as a compromise, providing for trial "by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[95]

At this juncture, another issue arose. The General Assembly noted that while the ILC's draft code listed aggression as the first offense, the General Assembly had already entrusted a special committee with the task of preparing a report on a draft definition of aggression.[96] The assembly decided to postpone consideration of the draft code until the special committee had submitted its report.[97] That decision effectively ended active consideration of the issues for the next 25 years. Not until 1981 did the General Assembly invite the ILC to resume its work on the draft code.[98] Another 15 years passed before the commission finally produced a second draft code.[99]

It took the events in the former Yugoslavia and Rwanda to move the issue forward in an expeditious manner. In late 1992, the General Assembly requested the ILC to undertake the "elaboration of a draft statute for an international criminal court."[100] Subsequently, in 1993 and 1994, the Security Council authorized ad hoc tribunals for the former Yugoslavia and for Rwanda. The ILC moved expeditiously on the ICC assignment, issuing its report in 1994. Because of continuing division over the desirability of establishing a permanent court, the assembly first established an ad hoc committee to study the issue further and then two years later authorized a preparatory committee to prepare a statute for consideration by a conference of plenipotentiaries. Early in 1998, the preparatory commission produced a consolidated text of a statute regarding the establishment of a permanent international criminal court for adoption at a diplomatic conference held in Rome from June 15–17, 1998.

At the conference, states voted to establish a permanent court by an overwhelming majority (120–7–21 abstentions). The Rome Statute entered into force on July 1, 2002 (60 ratifications). Of the five permanent members of the UN Security Council, Britain and France have ratified the statute, the Russian Federation has signed it (September 2000), China has not signed, and the United States has "withdrawn" its signature. Of others, Germany and Italy have ratified, Japan did not sign; Iran signed (December 2000), Iraq did not. Neither India nor Pakistan signed.[101]

The International Criminal Court sits at The Hague and operates as an independent international organization.[102] The court became a functioning entity in February 2003 when the Assembly of States Parties elected the 18 judges of the court. The Assembly of States Parties forms the management oversight and legislative body for the court. The assembly has a permanent secretariat and a bureau (interim oversight) to manage the everyday operations of the court. The court consists of 18 judges elected for nine-year terms. It is divided into three functional chambers or divisions: pretrial, trial, and appellate. The Appeals Division is composed of the president of the court and four other judges; the Trial Division consists of the second vice president and five other judges; and the Pretrial Division is headed by the first vice president and six other judges.[103] The other important official is the prosecutor, who heads the Office of the Prosecutor and who is also elected for a nine-year term.

Article 5 establishes the grant of subject matter jurisdiction as "limited to the most serious crimes of concern to the international community as a whole"—genocide, crimes against humanity, war crimes, and aggression.[104] The Rome Statute, rather than referencing the relevant treaties, contains definitions of the crimes within its substantive jurisdiction listed in Article 5 within the body of the treaty. Concerted attempts to include drug trafficking and terrorism in the list failed. More importantly, the *in personam* (personal) jurisdiction of the court was designed to be *complementary* to that of national courts, meaning that the ICC may only try cases where "a state is *unwilling or unable* to carry out the investigation or prosecution."[105] Two further limitations on jurisdiction exist as well. The court may only seize cases where the events (or portions of the events) have occurred after July 1, 2002, when the Rome Statute entered into effect. Second, double jeopardy applies as well. The court may not try individuals if they have already been tried in another court unless the trial was considered a sham designed to absolve the person of any guilt (Article 20).

In the future, judges will have nine-year terms. The Rome Statute provides that six will be elected every three years. The judges constitute a forum of international experts who represent the world's principal legal systems.[106] Judges must be nationals of states parties to the statute. Cases may come to the ICC, by recommendation of a state party, by recommendation of the Security Council, or through the action of the chief prosecutor acting *priopio motu* (on his or her own authority). Articles 11–21 of the statute establish the bases of jurisdiction. In the case of a referral from a state party, Article 12.2 provides that state referral must satisfy one of two conditions: the crime must have been committed on the territory of the requesting state (or within other *territorial* jurisdiction such as aircraft or vessel registered in the state) and/or by a national of the requesting state. A non-state party may refer a case if it explicitly accepts the jurisdiction of the court and agrees to cooperate fully (Article 12.3).

The first several cases illustrate the procedure. The president of the Democratic Republic of the Congo requested an investigation into events that occurred within the DRC after the statute of the court entered into force. The investigation resulted in the court issuing indictments for four individuals.[107] The UN Security Council formally referred the situation in Darfur (Sudan) to the court in 2005. A UN referral has broader scope in that it may encompass acts committed in the territory of states that are not party to the statute and by nationals of states not party to the statute. At this writing, the court had issued four indictments relating to Darfur.[108] Considering the nature of the situation, many human rights activists have pushed for the establishment of a special prosecutor just for Sudan. So far, the prosecutor has not acted *proprio motu*.

As of this writing, the ICC has 22 cases associated with ten "situations" under investigation. Four states parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali—have referred situations occurring on their territories to the court. In addition, the Security Council has referred the situations in Darfur, Sudan, and Libya—both non-states parties. After a thorough analysis of available information, the prosecutor has opened and is conducting investigations in all of the above-mentioned situations.[109] In addition, the court has issued arrest warrants for individuals in Sudan, Libya, Kenya, and Côte d'Ivoire. Critics have wondered why Africa seems to generate all of the cases.[110] The number of indictments has raised the issue of whether the ICC is deliberately picking on Africa.[111] During the May 2013 meeting of the African Union in Addis Ababa, serious discussion of a collective withdrawal of AU members from the ICC took place. AU leaders also sent a formal request to the United Nations Security Council to defer the proceedings initiated against President al-Bashir of Sudan and the three senior state officials of Kenya (President Uhuru Kenyatta, Deputy President William Ruto, and Joshua Arap Sang).[112] While the warrant against al-Bashir still stands, the prosecutor dropped all charges against Kenyatta (December 2014), and the trials of Ruto and Sang were suspended without prejudice in April 2016.[113] Many human rights activists view this as a major step backward in the drive to end what has been termed the "culture of impunity" that has operated to protect leaders like Idi Amin and others of his ilk from prosecution for their crimes.[114]

INTERNATIONAL COURT OF JUSTICE

The ICJ, as a court that hears disputes between states, still has a role in the criminal justice realm because issues might arise that involve traditional international law. The court consists of 15 judges elected jointly for nine-year terms by the General Assembly and Security Council. Judges must represent the principal legal systems of the world. No two judges may be of the same nationality. As a reflection of the structure of the UN as well as of international politics, from its inception the court has always included judges from the United States, Russia, Britain, and France. Only states may bring cases before the court. Judges do not have to recuse themselves from litigations involving their states of nationality. Instead, if a state involved in litigation before the court does not have a sitting judge on the court, it may select and appoint a judge ad hoc from a list of individuals who have the required credentials.[115]

Two cases illustrate the role the court may play. In the first, the issue concerns whether or not genocide as a crime may give rise to state responsibility (collective liability). Potentially, under customary law, a state could have a collective responsibility for genocide. The question of whether accession to, or ratification of, the 1948 Genocide Convention may yield a basis for collective responsibility formed one of the more interesting questions surrounding the treaty. Genocide as a crime clearly involves questions of individual liability, but when a government undertakes a deliberate policy that targets protected individuals, might these actions also involve *collective* liability or *state responsibility*? One such case currently seized by the court is the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*),[116] where Croatia has accused the state of Serbia of sponsoring acts of genocide involving Croatian territory and citizens. Previously, Bosnia-Herzegovina had instituted suits against Serbia on the same grounds in 1993 and again in 2001.[117] Bosnia sought to hold Serbia liable, rather than individual Serbs. If successful, Bosnia could have collected a huge sum in reparations. An interesting irony here: if Yugoslavia had not broken apart, the case would not have been possible. Bosnia would not have had standing because it would have lacked the requisite status as a sovereign state.

The decision illustrates both the possibilities and frustrations of litigation to settle such disputes. The court found that the Genocide Convention did create state responsibility in addition to the requirement that states parties take steps to prevent individuals from committing the prohibited and punishable acts and punish those who do. With some dissenting opinions, the court held that a state may be found in violation of the treaty when it commits genocide. In addition, it found that a state can be complicit in genocide as well. It found that genocide had occurred in Bosnia, affirming the ICTY's findings in *Krstić*.[118]

At this point, the decision took an interesting twist. The court ruled that Serbia incurred guilt in that it failed to prevent the massacre of 8,000 Bosnian Muslims at Srebrenica in 1995, but it was not directly guilty of acts of genocide during the war between Serbia and Bosnia. The decision took the form of several votes. On the key issue, the court decided (13–2 vote) that Serbia had not committed genocide through its organs or persons whose acts engage its responsibility under customary international law. On another issue, however, the court found by a 12–3 vote, that Serbia had violated its obligation to prevent genocide. In reasoning parallel to that in the *Krstić* and *Jelisić* cases, the court held that Bosnia did not provide sufficient evidence to establish the *special intent* on the part of Serbian officials. The court excoriated Serbia for the omission in terms of not acting with due diligence to prevent the massacres, but it did not find a connection sufficient to justify the charge of genocide. The question that cannot be answered is this: If Milošević had lived and his trial had gone to conclusion, would the ICJ have delayed until a decision there? An equally interesting conjecture: Does the decision in this case with 15 judges examining the evidence presented by Bosnia suggest that Milošević could have received a not-guilty verdict?

The second type of case arises when an issue of traditional public international law is involved. On April 11, 2000, Belgium, asserting a claim to universal jurisdiction over certain human rights violations, issued an arrest warrant for Abdoulaye Yerodia Ndombasi of the Democratic Republic of the Congo. At the time, Ndombasi served in an official capacity as foreign minister of the incumbent government. The DRC immediately filed suit in the ICJ demanding annulment of the warrant. The application cited two issues:

> (1) Violation of the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality among all Members of the United Nations (Article 2. 1, of the Charter); and,
> (2) Violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41.2, of the Vienna Convention on Diplomatic Relations.[119]

In its judgment, the court found (13–3) that issuance of the warrant constituted violations of a legal obligation of the Kingdom of Belgium toward the Democratic Republic of the Congo. In issuing the warrant, Belgium had failed to respect both the immunity from criminal jurisdiction and the inviolability that the incumbent minister for foreign affairs of the Democratic Republic of the Congo enjoyed under international law.[120]

A NOTE ON OTHER COURTS

The ICTY and ICTR established a precedent. A problem quickly emerged. Many other situations had evolved where advocates pressed for courts as a mechanism to deal with the issues. In particular, Cambodia and East Timor stood at the top of the list.[121] Considering the problems associated with setting up the tribunals for Cambodia and East Timor, Kofi Annan, the secretary-general of the UN, resisted pressure to set up additional ad hoc courts. He based his position on several considerations. The post–Cold War era of cooperation among the Great Powers on the Security Council had passed. Wealthier nations that had borne the brunt of the considerable costs of the operating tribunals had become averse to any institution that would increase their financial obligations. Equally importantly, the establishment of the International Criminal Court provided a permanent forum that presumably would address these issues in the future.

PROBLEMS AND PROSPECTS

As with the tribunal at Nuremberg, the ICTY and the ICTR have had to deal with the difficulties inherent in trying to draw from both the civil and common-law traditions as well as international human rights law.[122] Moreover, despite the Security Council mandate, the tribunals have no independent means of enforcement beyond the active cooperation of national authorities. From the beginning, the ICTY had problems in rounding up the principal planners and instigators of the events for trial. The lack of political will on the part of all involved has continually undermined efforts to arrest the individuals most responsible for the atrocities in the Balkans. A decision by Prime Minister Tony Blair in 1998 resulted in British troops acting as peacekeepers in the Balkans, actively pursuing those wanted. This resulted in a number of high-profile arrests. Under considerable diplomatic (economic) pressure, Serbia finally surrendered Slobodan Milošević in 2001.[123] Only in July 2008 did the arrest of Radovan Karadžić, one of the most wanted, take place.

The ICTR has had a different set of problems. It has never lacked high-profile defendants because when the Rwandan Patriotic Front unseated the incumbent government, they actively pursued and arrested the ousted leaders. If anything, Rwanda has a surfeit of defendants. One report indicated that Rwandan jails had upward of 90,000 individuals imprisoned for complicity in the genocide.[124] The tribunal itself has had severe administrative problems as well as several scandals that undermined the credibility of the court. A report released by the United Nations' Office of Internal Oversight Services in March 2002 identified several serious acts of corruption. These involved fee splitting between defendants and defense lawyers, other actions that clearly constituted malpractice, dismissals for professional incompetence, employment of a defense investigator who participated in the genocide, and a staff member who solicited kickbacks from lawyers who wished to obtain expeditious payment for their services.[125]

Scandals aside, questions of cost form an area of major concern. Adhering to the ideal of fair trials has a hefty price tag. Consider the costs of maintaining the basic structure (overhead): in terms of salaries for judges, prosecutors, support staff, and facilities apart from the cost of trials. To use the ICTY as an example, apart from the 16 permanent and 12 *ad litem* judges, the bulk of the fixed cost comes from salaries and maintenance of 1,200 staff. In a 2004 statement to the UN General Assembly, Judge Theodor Meron, president of the ICTY, directly addressed the funding problems. He argued that the lack of funds threatened to undermine the body's work at a crucial time because the tribunal had had to reduce staff by more than 100—about 10 percent of its strength.[126]

Add to the ongoing fixed costs those of the actual trial. Trials can last two years. Some defense costs may be reduced because since 2003 defense lawyers have been paid on a lump-sum basis. The savings here, however, may be offset by the increased number of high-level defendants that has produced more complex trials.[127] One must consider, in addition to fees for defense attorneys, other administrative costs related to operating in an international environment. For example, fairness demands that all have easy access to the relevant documents. Erik Mose summarizes:

> The documents are all subject to disclosure and must be translated for legal teams and the accused. Translation may be required of thousands of pages into at least one official language of the Tribunal. The number of witnesses is often considerable,

> and interpretation of all testimony is required in three languages. Witnesses have often to be extracted from a difficult environment, afforded considerable protection before and after testimony and sometimes relocated. The staff and counsel involved in cases come from different cultures and traditions, and effective communication requires new skills and extra efforts. Defence Counsel have to leave their other casework for considerable periods to spend time working at the ICTR in Arusha, usually away from their practices.[128]

Both the ICTR and ICTY have largely overcome these problems and have gained considerable momentum toward completing their mandates by the end of 2016.

ASSESSING THE IMPACT

In sum, what have the courts accomplished? Obviously, we have to weigh the negatives against the accomplishments. Nonetheless, as a reminder of the ongoing controversies here, remember that for many individuals, the weights assigned to the various elements in the balance sheet, and hence, the worth of the overall projects, will vary according to deeply held prior assumptions (philosophical beliefs) about the merits of undertaking the project in the first place. The questions then revolve around more than appropriate measures of weights; they involve selecting the appropriate elements to include in the balance sheet as part of any evaluation. The positions reflect many different dimensions. Some have been addressed earlier in this chapter, some in earlier chapters. The following will briefly recap those voiced most often.

Adherents of *political realism* will reject the effort out of hand as no more than an expensive cosmetic window dressing that might produce some short-term results but will have no meaningful long-term impact. Many who oppose U.S. participation in the ICC go beyond this position to assert that institutions such as the ICC will actually have a long-term negative impact.[129] A variant of this position asserts that inflexible judicial solutions undercut diplomatic peacemaking efforts. Other critics focus on the reality that the mechanisms of legal process inevitably mean that only a few will be punished, undercutting the very idea of justice. Still others emphasize that reconciliation, not retribution, provides the necessary process for healing the schisms opened and exacerbated by situations such as Rwanda.[130]

Philosophical objections aside, what have the courts accomplished? The ad hoc courts represent first steps. They faced enormous difficulties in that they literally had to develop and evolve both procedural standards and substantive definitions from scratch. On the positive side, the courts have succeeded in that task. They have also managed to prosecute a number of high-profile defendants, including former heads of state. Cost-effectiveness aside, punishing some still sends a message because others may live in fear. In that sense, the courts have both established a relatively coherent body of practice and made inroads into the culture of impunity. The trials have had another, perhaps unintended, consequence. They have produced important oral and documentary evidence crucial to a full understanding of the events in the former Yugoslavia, Rwanda, and Sierra Leone. Without the trials, much of the full horror of the events revealed through investigation and testimony quite possibly would not have become part of any permanent record. Governments, participants, and even victims often suffer from selective amnesia, albeit for different reasons. To a great extent, history as we know it comes from the records of victors, not losers.

In looking back, two fundamental questions emerge: At what cost, and to what effect? Even the staunchest of advocates acknowledge that, to have an ongoing impact, the process needs much improvement. The future depends on whether or not the ICC and other international courts can overcome their crippling failure to work expeditiously, effectively, and especially, cost-effectively. Consider not only the length and cost of individual trials but the length of time the entire process has taken. Granted, much of this in terms of the early years occurred because judges, conservative by training and experience, proceeded very cautiously because they had no firm guidelines. Everyone involved knew each early case charted new ground. They proceeded cautiously and carefully. Future cases in other courts may proceed more expeditiously because they may draw upon the "cautious and careful" approach. If they cannot, this will become a serious impediment to the dream of abolishing the culture of impunity.

The Milošević trial, in terms of length, cost, and seeming ineptness of those responsible to make decisions to move it along expeditiously, gave critics much to criticize. It illustrates all of the problems of developing a completely new legal regime at the international level. In prime time, the trial made real the potential pitfalls of international legal procedure as a tool of retributive justice. As the first international trial of a head of state, the court, among other decisions, chose to err on the side of granting the defense considerable latitude in presenting its case rather than giving the impression of unfairness by imposing strict procedural limits.[131] The ICC needs to take this trial as the paradigm case of what must be improved if it is to establish credibility and legitimacy.

Do these cases exert enough of a *compliance pull* to act as deterrents to future perpetrators? Sadly, the answer here must be, for the moment, no. The troubled genesis of the courts and the sporadic and often reluctant support given by many states in terms of putting their blood and treasure in support of the principles they mouth in public still raise questions of how far-reaching the collective processes will be in terms of deterrence. Though often advanced as a rationale for international justice, here we should note that deterrence does not offer the best standard of evaluation even at the domestic level. We tend to overestimate the impact of deterrence as a factor in compliance with domestic law. Burglaries, car theft, drug dealing, and murder continue as major problems for domestic police. The fact that some who commit these acts have received punishment does not necessarily deter others from committing the same offense, sometimes over and over. Considering the sporadic application and ponderous pace of international justice, one should not expect that these trials will exert a deterrent effect in the short run. On the other hand, the precedents that have established liability for certain acts do mark progress. The international climate with respect to the validity of international criminal law has undergone a sea change over the past 15 years. The problem will be to maintain the momentum established by the tribunals.

To reiterate some points in a paraphrase, the wheels of international justice, when they have turned, have turned slowly, ponderously, and at great expense. Over the next few years, the ability of the ICC to bring those indicted to trial in a timely manner, and conduct trials in an expeditious fashion, will tell us much about the future. The ICC has a leg up in that it can draw on the experience of the ad hoc courts as well as their substantive and procedural precedents. The court will face the necessity of carving out its own niche—that is, establishing its own credibility. The progress in executing the indictment against President Omar al-Bashir for acts of genocide in Darfur will provide a test for the court as well as for the seriousness of the international community in moving forward.[132] The Arab League and the African Union both condemned the warrant. Since issuance, al-Bashir has visited Kenya, Egypt, and Qatar. All refused to arrest and surrender him to the ICC on arrival. The problems in executing the warrant suggest cooperation, even among African states that have endorsed other proceedings, is severely lacking. Al-Bashir continues to travel relatively freely in Africa, even to states that have ratified the Rome Statute.[133]

CHAPTER 10

So What? Is Prevention Possible?

> I once spoke to someone who had survived the genocide in Rwanda, and she said to me that there was now nobody left on the face of the earth, either friend or relative, who knew who she was. No one who remembered her girlhood and her early mischief and family lore; no sibling or boon companion who could tease her about that first romance; no lover or pal with whom to reminisce. All her birthdays, exam results, illnesses, friendships, kinships—gone. She went on living, but with a tabula rasa as her diary and calendar and notebook.
>
> —Christopher Hitchens[1]

> I did not know then how much was ended. When I look back now from this high hill of my old age, I can still see the butchered women and children lying heaped and scattered all along the crooked gulch as plain as when I saw them with eyes still young. And I can see that something else died there in the bloody mud, and was buried in the blizzard. A people's dream died there. It was a beautiful dream . . .
>
> —Nicholas Black Elk[2]

MEMORY AND HISTORY

The previous chapters have often mentioned the collective "amnesia" of the international community with respect to mass atrocity. National and international communities feign amnesia or ignorance and dismiss claims that contest their version of events. Nonetheless, for surviving victims, what happened goes beyond physical annihilation of individuals. The quotes heading this chapter capture two very different but salient dimensions of mass atrocity and genocide. Simply, the law of large numbers and the debate over what to call the collective barbarism tends to obscure the horrific impact on individual victims, whether called genocide or crimes against humanity. The quotes illustrate in brief why individuals wish to expand the formal definition. The deliberate destruction of a culture has an immense personal impact on individual survivors. The Christopher Hitchens narrative vividly captures an important consequence. Many individuals no longer have the comfort of an identity rooted in relationships that confirmed who they were as members of a family and community. Richard Hovannisian observes: "Complete annihilation of people requires the banishment of recollection and the suffocation of remembrance. Falsification, deception, and half-truths reduce what was to what may have been, or perhaps what was not at all."[3] For individuals, memory is the process of being in the present as the sum of our past—our own and our community's—be that geographical or emotional. Severing that nexus places an individual in a featureless emotional desert.

Still, collective memory is a selective process. Elizabeth Jelin has written of the "minefields of memory," which graphically describes the nature of the issues involved in *what* a society chooses to remember in terms of persons, places, and events; *how* it remembers the items selected; and *why* it remembers those particular persons, places, and/or events—that is, for what purposes.[4] Difficulties arise because of the how and why of collective memory. Serbs and Croats have very different memories of essentially the same set of events. The material in Table 10.1 comes from a website that defends Serbian actions in Bosnia and Kosovo.

In Belgrade, many regard Karadjić, Ražnatović (Arkan), and Mladić as heroes unjustly accused and persecuted by forces that had no basis for intervention and no authority to pass judgment on events. Shops sell coffee mugs emblazoned with their pictures. One finds a "culture of victimization" that does not acknowledge that the actions of Serbian forces,

Table 10.1

A Serbian View of Events in Bosnia*

"Truth is the first casualty of any war. One can hardly find more illustrative example of this fact than the case of civil wars in ex-Yugoslavia. In trying to find an excuse to a ruthless military occupation of strategically important Balkan Peninsula the bottomless pit of Western "morality" showed its face. Surpassing any Goebbelsian dream relentless propaganda left no stone unturned."

On the Croatian (Krajina) Serbs: "In the worst case of ethnic cleansing since the end of WWII, NATO cleans more than ONE MILLION SERBS from their ANCESTRAL LANDS" (emphasis in original).

On the Hague Court: "The mockery of the civilized juridical system."

What next?—What new atrocities are in preparation in Western "democracies" against the Serbian people?

*Excerpted from: http://www.srpska-mreza.com/ (November 2014) either local or JNA, were improper in any respect. As a reporter during the operations in Kosovo detailed:

> Serbs see themselves as a main victim in the breakup of Yugoslavia. They resent that tens or hundreds of thousands of Serbs were expelled from Croatia in 1995 in the Croatians' own "ethnic cleansing" campaign of forced deportations, yet no one indicted the Croatian leadership for war crimes. Serbs are endlessly mystified by attention paid by the West to Albanian refugees. . . . "No one cared anything about the Serbs when we were driven out," said . . . a refugee from the Krajina region of Croatia. "We were suffering and no one cared."[5]

People react to the perception of personal consequences to themselves and their neighbors regardless of what precipitated the events that led to the eventual outcome. In terms of humanitarian assistance, "the blame game" should not make a difference, but it does.[6] Those organizations perceived to be "on the side of the angels" in terms of appeals have a much easier time in fundraising to support their efforts. Many NGOs that provided humanitarian aid focused more on the Kosovars because the Serbs initiated the conflict. Many Serbs in Kosovo and Bosnia did suffer dreadfully from retaliation when the ethnic cleansing operations collapsed. For the most part, the ICTY has not pursued allegations against Croats and Kosovars. The complications and restraints associated with the requirements of formal legal procedures when combined with the tendency to paint scenes in the stark black and white of aggressors and innocent victims as a means of justifying the intervention limits numbers and choices.

To offer another example, the same holds true with Rwanda. The introductory essay to a compilation of articles by a distinguished panel of experts asserts: "The international community did nothing to stop the Rwandan genocide. A complete holocaust was only prevented by the military victory of the Rwandan Patriotic Front."[7] While true, the statement and subsequent analysis glosses over significant human rights abuses by the RPF and consequent toll on the Hutu population. The political climate, the mandate and limited resources of the ICTR, combined with an insistence on a completion strategy has precluded systematic investigation of allegations against the RPF. All three examples highlight the need for developing accurate accounts that give just due to the recollections and concerns of all victims.

These observations should not be taken in any way as statements of justification. *Tu quoque*[8] arguments and vivid memories continue to fuel cultures of vengeance based on legacies of extreme bitterness. Deep-seated resentments do not easily heal. A hundred years after, the Armenian community still seeks to have the Turkish government acknowledge responsibility for the events that decimated their numbers. That memory binds them still as a people, even as time, and for those in the diaspora, distance, somewhat diminishes the intensity. In the former Yugoslavia, memories of events during and after World War II provided the tinder for demagogic politicians to fan the flames of ethnic identity and national consciousness that have left glowing embers that could easily fuel still another round of ethnic cleansing. The previous comments apply to Rwanda and Burundi, Bosnia, and Kosovo as well as to East Timor and many other areas around the world. The primary point to keep in mind is that peoples (ethnicities, religious groups, etc.) who have perceived themselves in a struggle that seemingly involves questions of identity and survival may lack the essential tools to generate the trust and credibility needed to rebuild a viable order together. Accusations of bad faith, at the least, and perceived violation of mutual agreement by those committed to an ethnic/religious purity agenda on both sides will continually challenge good-faith efforts to build solid bases for reconciliation. The record of the past 25 years illustrates that seeds sown by past violence can lay dormant for years but if deliberately cultivated could once again germinate to produce a bitter harvest.

CALLS FOR ACTION: THE CALCULUS OF CONSENT AND THE COSTS OF CONSCIENCE

Since Westphalia, the operational principles that states acknowledge have evolved from a productive interaction of idealism and pragmatism. Without idealism to set goals that transcend the demands of the immediate defined by the narrow self-interest of particular states, the essential exchanges in political interaction would remain on the most elemental level. Without a leavening dialectic with the "art of the possible" defined by the traditions gleaned from conservative statesmanship and experience, ideals would remain undeveloped, ethereal, and isolated from political experience. The tension between the two reflected in the ebb and flow of decisions ensures that the mix at any specific time will never fully satisfy advocates of either position.[9] Any idea of progress involves both perspectives. Progress depends on the development and application of new ideas and approaches. The practical policy maker or problem solver who is open to new possibilities will attempt to adapt ideals considered useful to changing circumstances by grafting them to rootstock gleaned from those practices deemed useful and successful in the past. For idealists, progress will never occur at an acceptable pace; for realists, innovation means the possibility of new, unanticipated, and unwanted challenges. Fifty years ago, Robert Osgood asserted with respect to the dilemmas faced by the United States after World War II:

> The conflict between ideals and self-interest is as much a part of the international life of the United States as it was of Athens. It is, in fact, a fundamental part of all human relations, whether among individuals or groups of individuals for man's

> conscience is geared to ideal aspirations which his innate selfishness prevents him from attaining . . . [T]he reconciliation of ideals with self-interest is one of the central problems of all human experience and philosophical speculation.[10]

Remember that the key players here are political officials who focus on the logic of consequence rather than the logic of conscience, not because they necessarily disapprove of the ideals but because they would be held responsible for the consequences. Ideals insofar as they represent innovation also contain unknown risks. Because many courses of action will affect others as well as the decision-maker's own state, political advisers must take into account the attitudes of allies, adversaries, and interested third-party onlookers about what constitutes permissible and possible conduct in response to specific incidents.[11]

Arguably, the era post World War II has witnessed the greatest change in the international system since the Treaty of Westphalia (1648), which ended the Thirty Years' War. The two most drastic changes, expansion of the state system and the proliferation of international organizations, both intergovernmental (IGOs) and international nongovernmental (INGOs or NGOs), actually began after World War I with the breakup of the Ottoman Empire and development of the League of Nations. However, the most dramatic impact of these trends occurred after World War II, particularly in the period between 1955 and 1995. With the dissolution of colonial empires and the end of the Cold War, the number of independent states increased almost fourfold. Consider that at its inception in 1945, the United Nations had 51 members—today it has 193. Similarly, the era has witnessed the exponential growth of IGOs and NGOs. A recent estimate places the number of NGOs at 40,000,[12] with the number of IGOs of various sorts at over 2,000.[13]

A third trend, the development of a widespread concern for human rights accompanied by a multitude of formal multilateral treaties, has an ironic twist. The evolution of human rights regimes has challenged the hard-shell Westphalian concept of sovereignty. The Universal Declaration of Human Rights (1948) and the Genocide Convention (1948) marked the genesis of the modern human rights movement. The Genocide Convention received sufficient ratifications to enter into force in 1951. The Universal Declaration of Human Rights, as a resolution of the United Nations General Assembly, had no legal force. Development of the UN resolution into treaty format took another 18 years, resulting in two multilateral instruments: the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). Several other multilateral conventions, sometimes referred to as law-making treaties, banning torture and other crimes followed. The downside of the development of the human rights regime and the accompanying evolution of international criminal law is that the lack of systematic and coordinated development often translated into a lack of sustained concern. The virtual nonexistence of either the will or means to enforce meant that the mantra of "never again" after the Holocaust unfortunately became a casualty of indifference, so that the actuality became "again and again."

Several factors came into play. First, the fears accompanying the Cold War dampened willingness to pay attention to the internal politics of states, either because they were putative allies or were within the opposing camp and therefore off limits because of undue risk. For the United States, human rights issues, except in the Carter administration, formed a useful tool in the propaganda war with the Soviet bloc but certainly did not constitute a first- or second-tier priority.

Second, most governments subscribed to a "hard-shell" (Westphalian) conception of sovereignty that entailed the understanding that states had an absolute right to do as they pleased within their own territory without external interference. One finds this definition enshrined in Article 2(7) of the United Nations Charter, which precludes the organization from dealing with any issue that falls essentially within the "domestic jurisdiction" of a member state. *The newly independent states, conscious of their dependent past, promoted the norm of nonintervention as an absolute*, uniformly asserting forceful opposition to any doctrine that might threaten their newly acquired status. The norms of the evolving human rights regime ran directly into resistance from those states that had just become independent and wished to protect their status, no matter the issue.

Third, while Cold War politics also paralyzed the United Nations because the main protagonists had veto power in the Security Council, making any action that involved themselves or a client state of either side impossible, the ill-starred peacekeeping mission in the Congo (1960–1964) also made the organization shy away from any comparable venture until the early 1990s.

Fourth, most of the international treaties that established crimes under the newly evolving international criminal law regime, including the Genocide Convention, lacked any specific procedures concerning enforcement. The signing and opening of the Rome Statute of the International Criminal Court in 1997 marked the realization of an idea that accompanied the Genocide Convention but took almost 50 years to become a reality. Nonetheless, the Rome Statute does not have a formal mechanism that permits the court to enforce the arrest warrants it issues. The ICC must depend on member states parties to undertake the necessary action.

Fifth, while unilateral interventions did occur,[14] the adverse and hypocritical response to Vietnam's intervention that ended the Khmer Rouge reign of terror in Cambodia (Kampuchea) stands as a reminder of the convoluted politics of the Cold War and anticolonial period. Condemnation came from states from the global South[15] who opposed any intervention of any kind and an odd coalition led by the United States that simply wished to isolate and punish Vietnam (this included the People's Republic of China). The ostensible goal of the intervention did not matter. The senseless response lent continuing legitimacy to the Khmer Rouge, permitting them to maintain a rump government in the northwestern area of Cambodia and retain the Cambodian (Kampuchean) seat at the United Nations until 1993.

The end of the Cold War saw a renewed peacekeeping activism on the part of various international organizations including the United Nations. Unfortunately, another UN peacekeeping operation in Somalia came to an end with most of its objectives unachieved and with the experience leading to an unwillingness of many former advocates of more aggressive collective action to undertake another such operation.[16] The experience in Somalia explains much about the reluctance of states to extend the mandates of peacekeeping operations in Bosnia and Rwanda to permit more aggressive measures. Not unexpectedly, because most of the perceived problems of mass atrocity and human rights abuse were occurring in areas considered part of the global South, the resulting tensions between sovereign rights and human rights added another set of issues to the ongoing and bitter North–South divide. One can see the rancor in the statements from the Serbian website highlighted earlier, criticizing outside intervention in Bosnia and Kosovo. It illustrates an important underlying sentiment shared by the great majority of states in the global South, that whatever the criteria used to justify intervention, these will apply only to the weak, never to the strong and powerful or those they protect. Unfortunately, the conflict between order, sovereignty, and human rights surfaces most often in states identified as part of the global South.

SOVEREIGNTY AND ITS DISCONTENTS: OUTRAGE AND INACTION[17]

The generally accepted attributes of a state and the meaning of sovereignty generated through state practice in the years since the Treaty of Westphalia (1648) stand at the center of the debate over intervention. Westphalian sovereignty has two attributes. First, it represents the authority of a state to control international affairs for a particular territory. In this first sense, with respect to international relations since Westphalia, the sovereign state has been the primary actor. Second, sovereignty imbues someone or a collection of persons as having supreme authority to make binding decisions for all others in a polity, meaning that the individual or group of individuals that govern a particular state hold the right to determine the type of rule concerning persons, places, and property within the territory considered as within that state's jurisdiction without interference from other states (norm of nonintervention). Hence, for a state to exercise its full sovereign rights in the international system of states, it must have a defined territory, people, a government reasonably in control of the territory, and *recognition* by other states that the claimant fulfills these requirements. International law simply requires a government, leaving issues of domestic organization for the state to decide.

A number of scholars have asserted that historical practice does not support assertions about the absolute nature of sovereign control and the attendant norm of nonintervention.[18] Yale Ferguson and Richard Mansbach argue that

> sovereignty is often equated with authority or competence and capacity, rather than considered as an idea for legitimating state authority. Sovereignty is, in fact, a juridical status, while actual authority, autonomy and capacity are always variable attributes . . . [T]he principle of non-intervention amounts to what Robert Jackson calls "negative sovereignty," that is, protection for brutal and corrupt regimes.[19]

Still, in this same vein, much of the evidence about the practice of humanitarian intervention in the 18th and 19th centuries ignores the simple fact that the Ottoman Empire and other target states had lost the capacity to maintain internal order and were too weak to resist (see Table 10.2).

Contemporary Trends

First, the greatest majority of states that have gained political independence over the last 60 years lack many of the attributes necessary to exercise effectively many of the functions implied by "Westphalian" statehood.[20] Michael Ignatieff has claimed that "chaos has replaced tyranny as the new challenge to human rights in the twenty-first century."[21] Some states, like Somalia, have collapsed altogether. Still others, like the Democratic Republic of Congo, remain states in name only. Afghanistan, Syria, and Iraq have ongoing bloody internal conflicts. States such as Nigeria, Colombia, Libya, and Mexico face major challenges to domestic peace from internal groups that operate with relative impunity in pursuing their own internal goals that often involve relatively small-scale, sporadic violence.[22] In some places, various non-sovereign actors, such as the Taliban in Afghanistan, possess much greater legitimacy than the government with regard to many inhabitants.

Second, the evolution of international criminal law and other human rights regimes that emphasize individual responsibility for certain actions, such as genocide, rather than the traditional attribution of collective responsibility, which effectively provided a mask of impunity for such actions, has led to a major conflict of principles. Traditionally, with only a few exceptions (international humanitarian law), individuals did not have rights or responsibilities; only states did. Agents acting as members of a

Table 10.2
The Treaty of Westphalia (1648)

One sees constant references to the Treaty of Westphalia as the beginning of the modern state system. The treaty ended the Thirty Year's War (1618–1648).[*] Actually, the Thirty Year's Conflict might form a better description because the "war" actually comprised a number of different wars with different opponents. Although often portrayed as a religious war, Catholic against Protestant, each segment of the long conflict encompassed a complex interrelated set of issues that involved war among the numerous German states, dynastic politics (Habsburgs and Bourbons), and the role of the Holy Roman Emperor in Germany as well as religious differences. The end of the Thirty Year's War denoted a major transition in assumptions about the structure of international politics and the resulting rules of the game.

The treaty marked the victory of "national" princes and kings by ending any valid "supranational" claims of the Pope and Holy Roman Emperor to exert *political* authority over any territory beyond their personal domains. The treaty formally ended the pretense embodied in the rivalry between the Pope and the Holy Roman Emperor over who truly represented the legacy and authority of the Roman Empire. Westphalia sanctified the sovereign territorial state as principal actor in international interactions. A sovereign state would henceforth recognize no other authority above it. Considering its adverse effect on the presumptive authority of the Catholic Church, Pope Innocent X issued a Papal Bull, *Zelo Domus Dei* (Zeal of God), in which he characterized the treaty as "null, void, invalid, iniquitous, unjust, damnable, reprobate, inane, empty of meaning, and effect for all time."[†]

The treaty produced a myriad of small, nominally independent sovereign entities. Germany alone encompassed almost 300 political units with some claim to sovereign status. Ironically, because war and conquest still formed an acceptable method of acquiring territory, many of these would disappear over the next 70 years, annexed by stronger neighbors. Major changes in the map of Europe occurred as empires disintegrated, and newly emergent powers such as Prussia and Russia sought to consolidate their positions.

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[*] Geoffrey Parker, *The Thirty Years' War* (London: Routledge, 1997); C. V. Wedgwood, *The Thirty Years' War* (London: Methuen, 1981, 1938).

[†] New Advent, "Pope Innocent X," *Catholic Encyclopedia*, http://www.newadvent.org/cathen/08020b.htm

governing authority did not incur personal responsibility for their actions. To paraphrase the now-trite saying about Las Vegas, what happened within a state, stayed in the state. The newly minted doctrine that sitting heads of state and other officials may be held personally accountable for actions that violate the conscience of humanity directly and starkly stands in opposition to traditional practice.

Third, the nature of contemporary problems has increasingly required joint action in efforts to regulate flows "of capital, information, ideas, goods, people, and pollutants across state borders."[23] Terrorists, drug dealers, migrants, electronic currency transfers, and email operate relatively freely across international borders, producing an interconnected set of networks where people, arms, money, and ideas flow freely across borders of sovereign states. Globalization describes a world featuring multiple systems of interaction, transaction, and communication that link societies in complex ways. These have severely diminished the importance of sovereign frontiers as barriers to social, economic, and political exchange. Unfortunately, the same conditions that generate positive transactions also facilitate the ability of those opposed to progress to project and support violence aimed at undermining the positive achievements.

Fourth, historically, the resources of individuals, firms, and other private groups, such as churches, have equaled or exceeded those available to most kings, princes, or governments, or even of many contemporary states. With the modern deregulation of capital markets, the resources controlled by large firms and banks, and of certain super-rich individuals, outstrip dramatically the resources of most states. In terms of GDP, according to World Bank data for 2015, out of 190 countries listed, Bill Gates by himself would rank 67th, just below Sri Lanka.[24] Walmart's annual revenues would rank it 23rd, just below Sweden but above Venezuela and Austria.

Responsibility, Authority, and Control

The debate here has moral, legal, and pragmatic dimensions. The moral dimension focuses on what *ought* to be done and why. The legal dimension must provide answers to the questions of who (or what institution or set of institutions) has the right to make an authoritative decision, in what instances, by what methods, and by what criteria. The pragmatic dimension concerns who will bear the political and material costs associated with any action—that is, who pays, and who will provide the actual men, money, and material for the intervention.

The philosophical and practical issues associated with "doing something" abound. Michael Walzer has stated the moral question in simple terms: "How much human suffering are we willing to watch before we intervene?"[25] Kofi Annan has questioned the nonintervention principle: "If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"[26] Annan has also argued with regard to the Charter of the United Nations that "when we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."[27]

No matter how emotionally compelling the hortatory statements of moral outrage, or compelling the calls for reform, any commitment to take action still faces three questions: (1) On what bases can the international "community" claim a moral duty and a legal right to intervene to end abuses; (2) who or what institutions have the authority to make decisions that embody action seen as legitimate by a majority of community members; and (3) who will bear the costs of conscience?[28] Another pragmatic observation reinforces an earlier point about perception and attitude. Richard Miller notes that "the idea that interventions might be morally acceptable provokes suspicion because some past interventions by Western powers have had imperialistic purposes and have produced enormous suffering. More than a few parts of the world continue to feel the crippling effects of Western colonialism, even after they have achieved political independence."[29] Given the history of colonial intervention, the presumptive rights of sovereignty, and the possible tangible costs in scarce tangible resources, any intervention unrelated to immediate self-interest must overcome a strong presumption against intervention. Hence, interventions shoulder a heavier burden of proof than those of justified war since they require nations to override the legal and pragmatic presumptions that underpin the norm of nonintervention. In sum, interventions, however praiseworthy their philanthropic aims appear, still put soldiers' lives at risk, burden tax resources, involve nations in wars that seem to have little immediate bearing on their own interests, and encroach upon the internal affairs of other states.[30]

The following provides a brief summary of the issues:[31]

1) What is the value of sovereignty and territorial integrity to the men and women who live within a particular state's territory as opposed to other values such as respect for human rights?
2) How much killing is "systematic killing"? What number of murders makes a massacre? How many people have to be forced to leave before we can talk of "ethnic cleansing"? How bad do things have to be to justify a forceful crossing, to justify an intervention?
3) If intervention is justified, who should fight it? Does anyone have a right or a duty to fight?
4) If a state or group of states (or the United Nations) decides to intervene, what kinds of armed forces should be used, at what costs to soldiers in the intervening army, and at what costs to soldiers and civilians in the invaded country?
5) What goals should the intervention seek to accomplish?

Keep in mind, the key variable is the presence of the political will to do something. The failures to respond in a timely fashion stem simply from an inability of governments to move quickly to back principle with decisive and appropriate military force and/or an effective mandate. In particular, also keep in mind that the states most likely to be influenced by considerations of humanity and justice are, for the most part, democracies. Correlli Barnett notes that while those electorates will be moved by the appalling scenes shown on newscasts, they might be quite willing to support the activities of humanitarian NGOs but probably far less willing to support action that would entail the loss of life by their own soldiers in support of aiding people in places about which they know little.[32] Ignatieff argues that the aversion to risk during the Kosovo crisis meant that citizens of NATO countries were willing spectators, not willingly engaged combatants: "The war was a spectacle: It aroused emotions in the intense but shallow way that sports do. The events in question were as remote from their essential concerns as a football game, and even though the game was in deadly earnest, the deaths were mostly hidden, and above all, they were somebody else's."[33] When abstract principles and ideals require blood sacrifice, action will require positive and concrete responses to the questions of vital interest and current needs. Television can highlight starving and abused children, but it can also graphically show humiliated or massacred soldiers.[34]

No clear political (or academic) consensus exists with respect to any of these questions. Debates about the criteria that might be used in making decisions form an open and ongoing debate. As noted in previous discussions, the overwhelming bias is against intervention. Without delving too deeply into these issues, I would suggest that abstract discussion cannot provide definitive answers to the critical questions. Too much of the decision process depends on the circumstances of the moment, including the political will of those involved. Over time, the operations of the UN Security Council, which has a rather open-ended mandate, have validated this conclusion.[35]

The Responsibility to Protect (RtoP)

In 2005, the UN General Assembly adopted the principle of the responsibility to protect—or RtoP, its UN abbreviation—in a unanimous resolution advocated by nongovernmental organizations. The resolution followed the recommendations of UN secretary-general Kofi Annan and the high-level panel he had appointed to investigate how the United Nations could pursue reform. The concept had been developed by Gareth Evans (a former Australian foreign minister) and Mohamed Sahnoun, co-chairs of the International Commission on Intervention and State Sovereignty, whose 2001 report urging adoption of RtoP drove the campaign for the concept.[36] The 2005 document articulating RtoP carefully delineated grounds for action under the doctrine, limiting it to four situations suitable for intervention: genocide, war crimes, ethnic cleansing, and crimes against humanity. The obligations flow from principles inherent in the concept of sovereignty, particularly the idea that state sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself.[37]

The Security Council accepted RtoP by unanimously adopting United Nations Security Council Resolution 1674 on April 28, 2006. The resolution reaffirmed two prior SC resolutions (1265 and 1296) that addressed the protection of civilians in armed conflict. The resolution marked the first time the Security Council had accepted a set of criteria to form a basis for humanitarian intervention in situations of armed conflict. In accepting RtoP, the Security Council helped bridge the gap between so-called legitimate (ethically justifiable) and legal (legally authorized) intervention. Note that the Kosovo Commission, a group of independent experts, had first advanced these two principles in 1999 while investigating the NATO intervention in Kosovo.[38] It deemed NATO's actions "illegal but legitimate," in the sense that the Western countries had performed a legitimate rescue of oppressed Kosovars likely to suffer ethnic cleansing under Slobodan Milošević's leadership but had done so without the Security Council's formal legal sanction, withheld due to the threat of Russian and Chinese vetoes.

The Security Council has claimed wide discretion to label events "threats to peace" when they did not necessarily qualify as dangers to "international peace." This phenomenon became more evident following the Cold War, when the Security Council approved a wide range of other triggers for Chapter VII sanctions. It has authorized arms embargoes, trade sanctions, no-fly zones, and even armed intervention against various acts of genocide, ethnic cleansing, violations of cease-fires, collapse of civil order, and war crimes in Haiti, Cambodia, Iraq, Liberia, Rwanda, Somalia, and the former Republic of Yugoslavia. Although the resolution authorizing force against Libya certainly further entrenched the principle of RtoP, *it does not resolve the tension between RtoP, itself only a General Assembly recommendation, and the UN Charter*.[39]

At this writing (August 2016)), Security Council resolutions have referenced RtoP 46 times.[40] Still, at this point, RtoP does not have the status of a legal principle. The criteria have not been codified in any treaty, nor does sufficient and consistent state practice exist to support a claim that the criteria have evolved into rules of customary law, nor can one make a case that they form general principles of law. At present they prescribe "norms of conduct" best described as expectations about how governments ought to conduct themselves. The power of RtoP depends on its ability to exert "compliance pull" and consequently political pressure.[41] The viability of the principle over time depends on the international community having the political will to act when states fail in their obligations.

INTERVENTION BY OTHER MEANS: SANCTIONS

Of course, the tendency, given the cases discussed in this volume, is to focus immediately on forceful intervention. Yet this ignores other possible means. Often overlooked (conveniently, one thinks) by contemporary neo-realist scholars, *prudence* formed the operative principle of conservative (realist) statesmanship. Prudence dictated that one should first try to achieve goals through peaceful diplomatic means before resorting to violence. As used here, a sanction involves any action taken in an attempt to change another's behavior by punishing them socially, economically, or politically. Sanctions do not include military intervention; rather, states see them as alternative means of coercion apart from overt use of military measures. Sanctions may be unilateral, imposed by a single country, or multilateral when a group or bloc of countries agrees to the action. International sanctions can include the following, alone or in combination: tariffs, quotas, embargoes, boycotts, asset freezes or seizures, and non-tariff barriers (NTBs). NTBs can include health, safety, licensing, and environmental standards that preclude certain goods from being imported because producers do not wish to bear the costs of compliance.[42]

As with any coercive measure, sanctions can have unintended consequences, affect the innocent more than the leadership, actually cause a rise in nationalist sentiment (see the earlier excerpts from the Serbian website), and exacerbate the problem. Given the logic of sovereignty, a state will most likely resist rather than submit. A compelling criticism of economic sanctions is that they often cause a great deal of innocent suffering without producing visible concessions on the part of the targeted state.[43] In many circumstances, economic sanctions have caused extreme economic harm to innocent citizens without changing the target country's policies. Because the impact of economic sanctions is rarely precise in the sense that they directly affect those responsible for the actions that generated the imposition, sanctions have been characterized as blunt tools of foreign policy. Some analysts have argued for so-called "smart sanctions" that target strategic commodities, such as arms and oil. Yet evidence indicates that these have been less effective than more comprehensive sanction regimes.[44] Hence, the dilemma revolves around the fact that the more harm sanctions have, the more likely the effort will influence the behavior of the target, but consideration of the human costs and questions of proportionality may limit the use of certain tactics.

The success of sanctions varies in accordance with the degree to which the state or group of states imposing the sanction can exert control over the targeted activity. With multilateral sanctions, the solidarity of compliance—that is, the collective political will—on the part of those states participating forms a critical concern. Note that sanctions do not promise short-term results and can have negative economic effects within the state or group of states imposing them. Over time, these costs could result in "sanctions fatigue" and erode political will. If the coalition lacks a unified political will, sanctions will also be less effective because some might not vigorously police the sanctions regime. Indeed, one weakness of economic sanctions stems from the possibility that the targeted state has other options or simply has a will to bear the costs. North Korea and Cuba are two long-standing examples.

Serbia and Sanctions

In May 1992, the United Nations Security Council imposed broad trade, financial, and political sanctions against Serbia and Montenegro for their role in provoking and supporting aggression, ethnic cleansing, and other atrocities in Bosnia. Complicating the implementation of sanctions was Serbia's position as the major transportation hub for much of southeastern Europe, notably via the Danube River. The Security Council's May 30, 1992, resolution had exempted transshipment cargo from sanctions, which allowed goods to transit Serbia. It quickly became clear that the Security Council measures were not being applied effectively and that the sanctions were not moderating Serb conduct in the Bosnia crisis. Neighboring countries proved politically and logistically unable to establish effective control over the movement of goods and commodities crossing Serbia's borders:

> Efforts to increase the effectiveness of the existing sanctions focused on six objectives: tightening border controls; cutting off Serbia's access to oil, gas and other essential commodities; bolstering financial sanctions on Milošević's supporters; prosecuting and penalizing sanctions violators; cutting off all maritime traffic to and from the ports of Kotor and Bar; and interdicting all Federal Republic of Yugoslavia (FRY) controlled vessels.[45]

A special effort was made to strengthen the impact of the financial sanctions by identifying and targeting the Milošević regime's offshore businesses and accounts. The U.S. government also attempted to restrict the flow of workers' remittances back to Serbia. The Serbian government had relied on these remittances in order to obtain badly needed hard currency.[46]

The sanctions reached their apex in December 1993. At this point, the flow of goods in and out of Serbia had been cut by more than 75 percent, and real income had contracted by more than 50 percent. Serbia began to seek relief. Despite government measures to mitigate the impact, the sanctions took a terrible toll on Serbia's infrastructure and economy. In September 1995, the country found itself facing a serious oil and gas shortage with winter just around the corner. Milošević agreed to negotiations, resulting in the Dayton Accords in late November 1995. The effective employment of sanctions on Serbia and Montenegro throughout this period did play a major role in bringing Milošević to Dayton.[47]

Realism and Organizational Structure: Who Decides?

On cursory examination, the United Nations comes to mind as one obvious shorthand response to the moral, legal, and pragmatic questions. As the only (almost) universal intergovernmental organization in the contemporary international political milieu, it would seem the most appropriate locus for debate and collective decision about these issues. Among international organizations, the United Nations has the most widely accepted legitimacy and, hence, the greatest formal authority. Alone among organizations, it can (theoretically) compel its member governments to fund such operations, even requiring contributions from those opposed to the intervention in question. While the organization has been at the center of debate about terrorism, genocide, and mass atrocity, its record of timely and effective response leaves much to be desired. A brief explication of the blend of ideals and self-interest reflected in the charter will shed some light on why this has been the case.

The original design of the United Nations was both evolutionary and conservative, drawing upon the structure of the League of Nations to a surprising extent.[48] It balanced Westphalian assumptions of sovereignty with the open-ended obligations of collective security. At its heart, the design depended on a plan to centralize the use of force in service of maintaining order. Force would only be used in self-defense or as a sanction after appropriate collective deliberation and authorization.[49] The model depended on the authority, power, and willingness invested in the Security Council to deal with conflicts or situations that might generate open conflict. With collective procedures in place, the need for states to utilize unilateral force as a measure of self-help apart from self-defense would no longer exist. The wedding of Westphalian assumptions to Wilsonian ideals produced a profoundly conservative set of governing assumptions.[50] The charter design sought to provide mechanisms to resist violent challenges to a status quo composed of well-defined peace-loving sovereign states. Such states would have internationally acknowledged governments and borders with governments considered legitimate by constituent populations. Any "enforcement" action would require a positive vote from all five permanent members of the Security Council. Needless to say, the postwar world yielded quite different challenges from those envisaged by the framers of the charter. Over the past 65 years, incidents that fit this characterization have formed the exception rather than the rule. Indeed, in the history of the organization, Desert Storm (1991), the American-led response to the Iraqi invasion of Kuwait, stands as the single example of the charter working as the framers envisaged.[51]

The Domestic Jurisdiction Issue: Not All Are Necessarily Equal

The devolution of colonial empires resulted in new states that jealously asserted and guarded their newly minted sovereign status. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations adopted by the General Assembly during a commemorative session to celebrate the 25th anniversary of the United Nations illustrated the attitude of the former dependencies in its emphasis on the prerogatives associated with sovereign status and insistence on a broad prohibition of actions considered as "interventionist."[52] For these states, the issues concerning minority white control of governments in Rhodesia and South Africa formed a permissible exception. The abject failure of the UN peacekeeping effort in the Congo (1960–1964) combined with the anti-interventionist bias of a great majority of members and the strictures imposed by Cold War politics, meant that the organization essentially stood on the sidelines over the next 16 years, although several operations in place—India–Pakistan, Cyprus, and the Middle East—continued.

The end of the Cold War seemingly opened the way for a more robust approach to peacemaking and peacekeeping by the United Nations. Under the leadership of Secretary-General Boutros-Boutros Ghali, the idea of "humanitarian intervention" encompassed a more active military response in terms of trying to separate warring factions and brokering peace settlements. The new activism received a setback with U.S. withdrawal from the Somalia operation after the death of several American soldiers. That incident led to the unwillingness to engage in response to the events in the former Yugoslavia and Rwanda. As a result, the organization returned to a more traditional set of peacekeeping/peacemaking requirements. At this writing (August 2016), the UN maintains 16 operations employing over 80,000 soldiers and police.[53] Most UN troops come from Third World countries whose costs per deployed soldier are a small fraction of any Western army but who often have little training in either professional military culture or peacekeeping techniques. A recent report from Stockholm International Peace Research Institute chides Western states for shying away from contributing troops to peacekeeping forces for fear of casualties: "The fear of peacekeeper casualties cannot be used to justify Western countries not contributing to missions in Africa or to UN peacekeeping operations. More openly acknowledging an absence of national interest in those missions would be a more legitimate explanation."[54]

Traditionally, UN peacekeeping drew on several fundamental principles: the consent of the parties to the conflict to a UN intervention, the impartiality of the missions and the individual peacekeepers as they interact with the host nation and its people, and the non-use of force by peacekeepers except in self-defense and in defense of the mission's mandate.[55] The essential idea behind peacekeeping is inherent in the term—those deployed are not there to engage in combat but to act as a mediating force. A number of missions have had extreme difficulties because the nature of the conflicts undermines the essential premises of "peacekeeping." *One cannot keep peace if there is no peace to be kept.* Conflicts in Sudan, Mali, the Democratic Republic of the Congo, South Sudan, Côte d'Ivoire, and the Central African Republic (CAR) pose difficult problems because maintaining "impartiality" merely places the peacekeeping force at risk with little prospect of help from a functioning central government. The UN has had a peacekeeping force in the DRC since 1999 with some progress, but the central government still lacks the capability of exercising effective rule over large parts of the country.

The situations in the Côte d'Ivoire (Ivory Coast) and the CAR are instructive. In the Ivory Coast, a September 2002 troop mutiny escalated into a full-scale rebellion because northern Muslims felt they were being discriminated against. Although most of the fighting ended in 2004, Ivory Coast remained bitterly divided. French and UN peacekeepers patrolled a buffer zone that separated the north, held by rebels known as the "New Forces," and the government-controlled south. After repeated delays, elections aimed at ending the conflict were finally held in October 2010. But the vote ushered in more unrest when the incumbent, Laurent Gbagbo, refused to concede victory to the internationally recognized winner, Alassane Ouattara. The ensuing four-month stand-off ended only when Ouattara's forces gained control of the south by capturing Gbagbo and declaring him deposed. In November 2011, Gbagbo was transferred to The Hague to stand trial at the International Criminal Court on charges of crimes against humanity.[56]

A December 2014 UN report on the situation in the Central African Republic determined that Christian militias have carried out ethnic cleansing of Muslims in the Central African Republic but that there is no proof of genocidal intent in the ongoing civil war. The commission also said the anti-balaka Christian militia and Muslim Seleka rebels have both committed war crimes and crimes against humanity in the CAR conflict. The mostly Christian or animist "anti-balaka" militia took up arms in 2013 in response to several months of looting and killing by Muslim Seleka rebels who had unseated President François Bozize and seized power in March. Since the March 2013 coup, violence in the CAR had escalated, with murder, rape, torture, and kidnapping/recruitment of child soldiers. The commission could not determine an exact death toll but noted that figures of 3,000 to 6,000 people killed "fail to capture the full magnitude of the killing that occurred."[57]

CONCLUSION

The contemporary world has three trends. The first is toward increasing integration, signified by the process of liberalization and globalization. The second involves a picture of disintegration in a great many places, signified by demands for self-determination and other internal conflicts fed by animosities that have many roots, including ethnicity and religion. As conflict continues to envelop states in Africa and the Arab world, the intersection of these two worlds has become more volatile with grievances being exported in the form of terrorism. Yet a third trend, a negative reaction to the impact of globalization within states in the global North, and a general malaise, has caused a political backlash as well.

After the end of the Cold War, economic globalization accelerated. It promoted development and prosperity in many countries and regions in the world, made technological progress, improved communication, increased mobility, and also increased government transparency. Economic cooperation between countries reduced the risks of war while raising the threshold of political conflict. However, the negative effects of globalization have become increasingly apparent in recent years. Problems accompanying economic growth and the increase in material wealth include high consumption of energy and other natural resources, the world environmental destruction, the concentration of wealth, the widening gap between rich and poor, and more complicated social contradictions due to the acceleration of capital and human resources flows. Financial instability, food and energy shortages, environmental pollution, climate change, illegal immigration, cross-border crime, terrorism, infectious diseases, product safety, and many other nontraditional security issues have become central issues in world politics.[58]

Margaret MacMillan suggests some chilling parallels with the situation before World War I. She points out that in 1900 Europeans had good reason to feel pleased with the recent past and confident about the future.[59] The 30 years since the Franco-Prussian War (1870) had brought an incredible expansion in production and wealth that produced fundamental transformations in society and the way people lived. Food was better and cheaper. There had been dramatic advances in hygiene and medicine. Faster communications, including cheap public telegraphs, meant Europeans were more in touch with one another. "Given such power and such prosperity, given the evidence of so many advances in so many fields in the past century," MacMillan asks, "why would Europe want to throw it all away?"[60] The answer is not reassuring.

One worries today that the Middle East does form a remarkable parallel to the Balkans prior to WWI. A similar mix of toxic nationalisms and other social cleavages threaten to draw in outside powers as the United States, Russia, and Iran look to protect their interests and clients. Modern-day Islamic terrorists mirror the revolutionary Communists and anarchists who carried out a string of assassinations in the name of a philosophy that sanctioned murder to achieve their vision of a better world. In 1914, Germany was a rising force that sought to challenge the preeminent power of the time, the U.K. Today, the growing power of China is perceived as a threat by some in the United States.[61] Right-wing and nationalist sentiments were rising across the board in Europe and elsewhere.

Add to this the fact that international organizations established after World War II and the existing mechanisms for global cooperation lag far behind the process of globalization, producing a serious and growing "deficit" in global governance in that existing international mechanisms lack the capacity to address current issues effectively and on a timely basis let alone those emerging. Otherwise, some regional, ethnic, and religious conflicts will be out of control, and cooperation between the major powers will be difficult to deepen and continue. Mass atrocity will continue as a fact of international political life.

Notes

PREFACE

1. http://tcmuseum.org/culture-history/lucayans/.

CHAPTER 1

1. Samuel Totten and William S. Parsons, "Introduction," in *Century of Genocide: Critical Essay and Eyewitness Accounts*, 3rd ed., ed. Samuel Totten and William S. Parsons (New York & London: Routledge, 2009), 3.

2. Manuel de Nòbrega quoted in Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven, CT: Yale University Press, 2007), 1.

3. Ibid., 1.

4. For example, see Jean Craven, "Les crimes contre humanitè," *Recueil de Cours* 76 (The Hague, 1950), 427 and references therein.

5. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), xi–xii.

6. Homer, *The Iliad*, trans. Samuel Butler (London: Longmans, Green, & Co., 1898), 6.56–61, http://classics.mit.edu/Homer/iliad.6.vi.html.

7. See for example, Barbara Tuchman, *A Distant Mirror: The Calamitous 14th Century* (New York: Knopf, 1978); Erik A. Johnson and Eric H. Monkonen, eds., *The Civilization of Crime: Violence in Town and County since the Middle Ages* (Urbana: University of Illinois Press, 1996).

8. Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT: Yale University Press, 1981), 12.

9. See Robert K. Hitchcock and Tara M. Twedt, "Physical and Cultural Genocide of Indigenous Peoples," in *Century of Genocide*, ed. Totten and Parsons, 413, 414.

10. See James Willson, *The Earth Shall Weep: A History of Native America* (New York: Grove Press, 1998), 34.

11. David Stannard, *American Holocaust: The Conquest of the New World* (Oxford, UK: Oxford University Press, 1992); see also Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (New York: Houghton-Mifflin, 1999).

12. Roger W. Smith, "Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide," in *Genocide and the Modern Age: Etiology and Case Studies of Mass Death*, ed. Isidor Wallimann and Michael N. Dobkowski (New York: Greenwood Press, 1987), 21.

13. R. J. Rummel, *Death by Government* (New Brunswick, NJ: Transaction Publishers, 1994).

14. http://www.un.org/en/documents/udhr/index.shtml. As a General Assembly resolution, the Universal Declaration (UDH) had no legal significance. Security Council resolutions require states to comply, but General Assembly resolutions stand only as recommendations that express the "opinion of the majority." In this case, many of the provisions of the UDH were interpolated into other instruments and reflected in the legal codes of many states.

15. Note that the first date in parentheses marks the year the treaty text was adopted and opened for signature and "ratification," that is, formal acceptance by governments. Signature alone does not bind a state. Ratification forms a separate and most important step. The treaty "enters into force"—that is, becomes active law—when it receives a sufficient number of ratifications deposited with the office of the secretary-general of the United Nations. The number of ratifications necessary for a treaty to enter into force will be explicitly stated within the text of the document.

16. Alex Alvarez, *Governments, Citizens, and Genocide: A Comparative and Interdisciplinary Approach* (Bloomington: Indiana University Press, 2001), 33.

17. See Robin Prior and Trevor Wilson, *The Somme* (New Haven, CT: Yale University Press, 2006). See also chapter 2 for a discussion of the "law of large numbers" with respect to reports of large numbers of death.

18. See David White and Daniel P. Murphy, *The Everything World War II Book: People, Places, Battles, and All the Key Events* (Avon, MA: Adams Media, 2007).

19. Remarks of President Bill Clinton at the Dedication Ceremonies for the United States Holocaust Memorial Museum, April 22, 1993, http://www.ushmm.org/research/library/faq/languages/en/06/01/ceremony/?content=clinton.

20. See Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Cambridge, MA: DaCapo Press, 2004). See also the video recording, *Shake Hands with the Devil: The Journey of Roméo Dallaire*, dir. Peter Raymont (San Francisco, CA: California Newsreel, 2005).

21. Totten and Parsons, *Century of Genocide*, 9.

22. On these points, see Samuel Totten, *First Person Accounts of Genocidal Acts Committed in the Twentieth Century: An Annotated Bibliography* (Westport, CT: Greenwood Press, 1991).

23. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, September 18, 2004 (January 25, 2005), 132.

24. Kuper, *Genocide*, 102.

25. See Walter K. Ezell, "Investigating Genocide: A Catalog of Known and Suspected Causes and Some Categories for Comparing Them," in *Remember the Future: The Impact of the Holocaust on Jews and Christians*, ed. Yehuda Bauer et al., vol. 3

(Oxford, UK: Pergamon Press, 1989), 2881 et seq.; Helen Fein, "Genocide, Terror, Life Integrity, and War Crimes: The Case for Discrimination," in *Genocide: Conceptual and Historical Dimensions*, ed. George J. Andreopoulos (Philadelphia: University of Pennsylvania Press, 1994), 95; Eric Markusen and David Kopf, *The Holocaust and Strategic Bombing: Genocide and Total War in the Twentieth Century* (Boulder, CO: Westview Press, 1995).

26. Jack Nusan Porter, "Introduction: What Is Genocide? Notes toward a Definition," in *Genocide and Human Rights: A Global Anthology*, ed. Jack Nusan Porter (Lanham, MD: University Press of America), 9–10.

27. Israel W. Charny, "Toward a Generic Definition of Genocide," in *Genocide: Conceptual and Historical Dimensions*, ed. Andreopoulous, 76.

28. Gérard Prunier, *Darfur: The Ambiguous Genocide*, rev. & updated ed. (Ithaca, NY: Cornell University Press, 2007), 129.

29. See Henry Campbell Black, *Black's Law Dictionary*, 5th ed. (St. Paul, MN: West Publishing Company, 1979), 863, 918.

30. Alvarez, *Governments, Citizens, and Genocide*, 34.

31. See http://atlasobscura.com/place/amir-timur-tamerlane-museum.

32. *Merriam-Webster Collegiate Dictionary Online*, http://www.merriam-webster.com/dictionary/genocide.

33. *Convention on the Prevention and Punishment of the Crime of Genocide*, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of December 9, 1948, entry into force January 12, 1951, in accordance with article XIII.

34. Philip Jessup, *A Modern Law of Nations: An Introduction* (New York: Macmillan, 1948), 4. Professor Jessup served a short term as the American judge on the International Court of Justice.

35. Lemkin, *Axis Rule in Occupied Europe*, 79.

36. *Convention on the Prevention and Punishment of the Crime of Genocide* (December 9, 1948), entry into force January 12, 1951, http://www2.ohchr.org/english/law/genocide.htm.

37. Lemkin, *Axis Rule in Occupied Europe*, 79.

38. See John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York: Palgrave Macmillan, 2008).

39. Lemkin, *Axis Rule in Occupied Europe*, 79

40. Ibid. (emphasis added).

41. Ibid., 81, citing Hermann Raushning, *The Voice of Destruction* (New York: G. P. Putnam's Sons, 1940), 138.

42. Lemkin, *Axis Rule in Occupied Europe*, 81.

43. The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (1951) 82 UNTS 279.

44. Section II.6(c) of the Charter of the IMT, Yale Law School, The Avalon Project, http://avalon.law.yale.edu/imt/imtconst.asp#art6.

45. *France v. Göring et al.*, (1946) 22 IMT 203, 45–46, cited in William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2009), 134.

46. Control Council Law no. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Yale Law School, The Avalon Project, http://avalon.law.yale.edu/imt/imt10.asp (emphasis added).

47. Note that the film *Judgment at Nuremberg* (1961), starring Spencer Tracy, focused on the Judges' Trial, not the IMT.

48. *United States v. von Weizsaecker et al.* (1951) 12 LRTWC 44.

49. *United States v. Otto Ohlendorf* (*Einsatzgruppen* case), IV Trials of War Criminal before the Nurnberg Military Tribunals under Control Council Law No. 10 (Hein, 1997), 15. Christopher R. Browning, *The Origins of the Final Solution* (Lincoln: University of Nebraska Press, 2004), 252–253, 292–293, 399–403.

50. *United States of America v. Greifelt et al*. (1948) 4 TWC 1, 13 LRTWC 1 (United States Military Tribunal). RSHA, or *Reichssicherheitshauptamt* (Reich Security Head Office), which included the *Geheime Staatspolizei* (Gestapo—Secret Police) and the *Kriminalpolizei* (Kripo). Kripo dealt with nonpolitical serious crimes.

51. See H. Donnedieu de Vabres, "Le procès de Nuremberg devant les principes modernes du droit pénal international," 70 *Recueil des Cours*, vol. I, 1947, 477–582 (translated into English in Guénaël Mettraux [ed.], *Perspectives on the Nuremberg Trial* [Oxford, UK: Oxford University Press, 2008], 213–273).

52. G.A. Res. 95(1), UN GAOR, 1st Sess., 55th mtg. (December 11, 1946), http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement.

53. G.A. Res. 96(1), UN GAOR, 1st Sess., 55th mtg. (December 11, 1946), http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement.

54. Note that although "treaty" is the most common word, there are many other terms—"convention," "protocol," "covenant," "final act," and "statute"—that convey the same obligations. Gerhard von Glahn and James Larry Taulbee, *Law Among Nations*, 10th ed. (New York: Pearson, 2012), 72–73. Multilateral "law-making" treaties are often termed "conventions."

55. *Convention on the Prevention and Punishment of the Crime of Genocide.* Note that the vote of the General Assembly only produced the final version of the text that each individual state would then have the option of formally accepting or not. Acceptance requires the formal filing of an instrument of ratification (or accession) with the secretary-general of the UN.

56. See *Draft Code of Crimes against the Peace and Security of Mankind,* text adopted by the International Law Commission at its 48th session, in 1996, and submitted to the General Assembly as a part of the commission's report covering the work of that session. *Yearbook of the International Law Commission*, 1996, vol. II (part II), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf.

57. See James L. Taulbee, "A Call to Arms Declined: The United States and the International Criminal Court," *Emory International Law Review* 14, no. 1 (2000): 105–157. For the struggle in the United States over ratification of the Genocide Convention, see Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham, NC: Duke University Press, 1991).

58. "Timeline: Siege of Srebrenica," BBC News, http://news.bbc.co.uk/2/hi/675945.stm.

59. *Prosecutor v. Krstić* (Case No. IT-97-24-T), Judgment July 31, 2003.

60. Schabas, *Genocide*, 129.

61. *Genocide Convention*, Article II (emphasis added).

62. Alvarez, *Government, Citizens, and Genocide*, 37–38.

63. For a recent review of a large number of definitions, see Adam Jones, *Genocide: A Comprehensive Introduction* (London: Routledge/Taylor & Francis, 2006), ch. 1.

64. Marion Levy, "'Does It Matter If He's Naked' Bawled the Child," in *Contending Approaches to World Politics*, ed. Klaus Knorr and James N. Rosenau (Princeton, NJ: Princeton University Press, 1969), 87–106.

65. Kuper, *Genocide*, 39.

66. For a recent review of a large number of scholarly definitions, see Adam Jones, *Genocide: A Comprehensive Introduction* (London: Routledge/Taylor & Francis, 2006), ch. 1.

67. Barbara Harff and Ted Robert Gurr, "Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945," *International Studies Quarterly* 32, no. 3 (1988): 359–371. Harff and Gurr were not the first to use the term "politicide," but their definition has the most relevance for this chapter.

68. Rummel, *Death by Government*, 1.

69. Some dispute this, arguing that the two crimes pose differing requirements. See for example, "Crimes against Humanity," in *An Introduction to International Criminal Law*, ed. Robert Cryer et al. (Cambridge, UK: Cambridge University Press, 2007), 190.

70. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on May 25, 1993, UN Doc. S/RES/827 (1993), Art. 2.

71. Draft Code of Offences against the Peace and Security of Mankind.

72. See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (Princeton, NJ: Princeton University Press, 2000), ch. 4; and Kiernan, *Blood and Soil*, ch. 10.

73. For example, Richard R. Minear, *Victor's Justice: The Tokyo War Crimes Trials* (Princeton, NJ: Princeton University Press, 1971); Bass, *Stay the Hand of Vengeance*, ch. 5.

74. See Antonio Cassese, "The Martens Clause: Half a Loaf or Pie in the Sky?" *European Journal of International Law* 11, no. 1 (2000): 187–216.

75. Margaret M. deGuzman, "Crimes against Humanity," in *Routledge Handbook of International Criminal Law*, ed. William Schabas and Nadia Bernaz (London: Routledge, 2011), 123.

76. *Report of the Committee on International Criminal Jurisdiction*, UN Doc. 1/2645 (1954).

77. Draft Code of Offences against the Peace and Security of Mankind (1954). Text adopted by the International Law Commission at its sixth session, in 1954, and submitted to the General Assembly as a part of the commission's report covering the work of that session (at para. 54). *Yearbook of the International Law Commission, 1954*, vol. II, 134–137, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf.

78. Article 2.11, Draft Code 1954, 150.

79. See *Report of the International L aw Commission*, UN GAOR, 46th Sess., Supp. No. 10, at 238, UN Doc. A/46/10 (1991). See Phyllis Hwang, "Defining Crimes against Humanity in the Rome Statute of the International Criminal Court," *Fordham Law Review* 22, no. 2 (1998): 457–504.

80. In the interim, national courts in Canada, France, and several other European countries instituted prosecutions against individuals for crimes against humanity. These proved both lengthy and contentious because the Nuremberg precedents provided little in the way of guidance. The French cases provide exemplars, see Leila Sadat Wexler, "The French Experience," in *International Criminal Law*, 2nd ed., ed. M. Cherif Bassiouni (New York: Brill, 1999), vol. III, 273–300.

81. *International Convention on the Suppression and Punishment of Apartheid*, adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of November 30, 1973, entry into force July 18, 1976, http://www.unhchr.ch/html/menu3/b/11.htm.

82. Belem Do Para, Brazil, September 6, 1994, entry into force March 28, 1996, http://www.oas.org/juridico/English/sigs/a–60.html.

83. *Statute of the International Tribunal for the Former Yugoslavia,* adopted May 25, 1993, by UN General Assembly Resolution 827, as amended May 13, 1998, by UN General Assembly Resolution 1166, as amended November 30, 2000, by UN General Assembly Resolution 1329, http://www.icls.de/dokumente/icty_statut.pdf; Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994) November 8, 1994, http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf.

84. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, http://www.un.org/law/icc/statute/romefra.htm.

85. See Article 2, Statute of the Special Court for Sierra Leone, 217 UNTS 138 (2002), http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&.

86. See the 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended in 2004 ("ECCC Law"), and the 2004 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("UN/Cambodia Agreement"), http://untreaty.un.org/cod/avl/ha/abunac/abunac.html.

87. United Nations Security Council Resolution S-RES-1410(2002); United Nations Security Council Resolution S-RES-1599 (2005).

88. Mark Memmott, "Abbas Repeats Accusation That Israel Is Waging 'Campaign of Ethnic Cleansing,'" NPR News, http://www.npr.org/blogs/thetwo-way/2012/09/27/161891318/abbas-repeats-accusation-that-israel-is-waging-campaign-of-ethnic-cleansing.

89. Jennifer Jackson Preece, "Ethnic Cleansing," in *The Encyclopedia of Human Rights*, vol. II, ed. David P. Forsythe (Oxford: Oxford University Press, 2009), 163. For a deconstruction of the meaning, see Drazen Petrovic, "Ethnic Cleansing—An Attempt at Methodology," *European Journal of International Law* 5 (1994): 1–19.

90. Andrew Bell-Fialkoff, "A Brief History of Ethnic Cleansing," *Foreign Affairs* 72, no. 3 (Summer 1993): 110. Others disagree, in particular see Norman M. Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe* (Cambridge, MA: Harvard University Press, 2002).

91. Preece, "Ethnic Cleansing," 163

92. Bell-Fialkoff, "A Brief History," 110.

93. Petrovic, "Ethnic Cleansing," 15.

94. International Criminal Court, Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html.

95. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (PA-I), http://www.unhchr.ch/html/menu3/b/93.htm; and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Conflicts (PA-II), http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument.

96. See *The Guardian*, February 25, 2013, http://www.guardian.co.uk/world/syria.

97. Harff and Gurr, "Toward Empirical Theory of Genocides and Politicides," 359.

98. Ibid., 360.

99. Helen Fein, "Scenarios of Genocide: Models of Genocide and Critical Responses," in *Toward the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide*, ed. I. W. Charny (Boulder, CO: Westview Press, 1984); Vahakn N. Dadrian, "A Typology of Genocide," *International Review of Sociology* 5, no. 2 (1975), 201–212.

100. Rummel, *Death by Government*, 34.

101. Ibid., 36

102. Alvarez, *Governments, Citizens, and Genocide*, 46.

CHAPTER 2

1. Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), xvii.

2. Advisory Opinion, *Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide*, May 28, 1951, *ICJ Reports* 1951, 23, http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=90&case=12&code=ppcg&p3=4.

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CHAPTER 3

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90. Alexander Laban Hinton and Robert Jay Lifton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* (Berkeley: University of California Press, 2004).

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CHAPTER 4

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2. Sarkin has an excellent discussion evaluating the estimates made by various writers. Jeremy Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers* (Cape Town, SA: UCT Press, 2010), 136–142.

3. Jon M. Bridgman, *The Revolt of the Hereros* (Berkeley: University of California Press, 1981), 1.

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10. Paul Rohrbach quoted in Bridgman, *Revolt of the Hereros*, 31.

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18. Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, CT: Yale University Press, 1990), 29. See also Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman: University of Oklahoma Press, 1987).

19. Isabel V. Hull, "Military Culture and the Production of the Final Solutions in the Colonies: The Example of Wilheminian Germany," in *The Specter of Genocide Mass Murder in Historical Perspective*, ed. R. Gellately and Ben Kiernan (Cambridge, UK: Cambridge University Press, 2003), 143.

20. Bridgman, *Revolt of the Hereros*, 35.

21. "Take your banner!, Onward go!, Christian soldiers seek your foe, And the devil to refute, Do not hesitate to shoot." Quoted in Richard A. Voeltz, "Review of Nils Ole Oerman, Mission, Church and State Relations in South West Africa under German Rule (1884–1915)," *The International Journal of African Historical Studies* 33, no. 1 (2000): 155.

22. For a discussion of this point, see Voeltz, "Review of Nils Ole Oerman, Mission, Church and State Relations," 153–155.

23. Hitchcock and Twedt, "Physical and Cultural Genocide," 429.

24. Short for Ovaherero, or "people of yesterday."

25. The Nama formed part of the Khoikhoi (Khoekhoe). Europeans (mainly the Dutch) labeled them hottentots for the sound of their name when pronounced in their native language, http://www.thefreedictionary.com/Hottentot.

26. Sarkin, *Germany's Genocide*, 34 (emphasis added).

27. For a more complex breakdown, see Sarkin, *Germany's Genocide*, 33–35; Bridgman, *Revolt of the Hereros*, 26–28.

28. John Bridgman and Leslie J. Worley, "Genocide of the Hereros," in *Century of Genocide: Critical Essays and Eyewitness Accounts*, 3rd ed., ed. Samuel Totten and William S. Parsons (New York: Routledge, 2009), 19.

29. Gesine Krüger, "The Golden Age of the Pastoralists: Namibia in the 19th Century," in *Genocide in German South-West Africa: The Colonial War (1904–1908) and its Aftermath*, ed. Jürgen Zimmerer and Joachim Zeller, trans. Edward Neather (Monmouth, WLS: The Merlin Press, 2003), 11.

30. Krüger, "The Golden Age of the Pastoralists," 10–11.

31. Bridgman, *Revolt of the Hereros*, 38. Palgrave returned to South-West Africa (SWA) in 1884 at the request of Kamaherero. Britain recognized German authority over SWA while he was in transit back to Cape Colony.

32. Ibid., 38.

33. Olusoga and Erichsen, *The Kaiser's Holocaust*, 42–43.

34. Horst Dreschler, *Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism, 1884–1915*, trans. Bernd Zöllner (London: Zed Press, 1980), 37–38.

35. Ibid., 41–42.

36. Bridgman, *Revolt of the Hereros*, 55.

37. Quoted in Dreschler, *Let Us Die Fighting*, 69.

38. Quoted in Olusoga and Erichsen, *The Kaiser's Holocaust*, 57.

39. Quoted in Dreschler, *Let Us Die Fighting*, 70.

40. Ibid. Bridgman (*Revolt of the Hereros*, 45), who cites Dreschler's *Southwest Afrika under German Colonial Rule* (*Südwestafrika unter Deutscher Kolonialherrschaft*), asserts that 150 total were killed.

41. Jürgen Zimmerer, "The Model Colony? Racial Segregation, Forced Labour and Total Control in German South-West Africa," in *Genocide in German South-West Africa*, ed. Zimmerer and Zeller, 26–27; Olusoga and Erichsen, *The Kaiser's Holocaust*, 79.

42. Quoted in Sarkin, *Germany's Genocide*, 45.

43. Dreschler, *Let Us Die Fighting*, 78–79.

44. Ibid., 81.

45. Bridgman, *Revolt of the Hereros*, 49–50.

46. Jan-Bart Gewald, *Herero Heroes: A Socio-political History of the Herero of Namibia, 1890–1923* (Oxford, UK: James Curry, 1999), 101–102. See also Jan-Bart Gewald, "Colonisation, Genocide and Resurgence: The Herero of Namibia, 1890–1923," in *Genocide in German South-West Africa*, ed. Zimmerer and Zeller, 123–142.

47. Quoted in Dreschler, *Let Us Die Fighting*, 87.

48. Jan-Bart Gewald, *Herero Heroes*, 85.

49. Quoted in Dreschler, *Let Us Die Fighting*, 93.

50. Benjamin Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," *Journal of Genocide Research* 6, no. 2 (2004), 182.

51. "A specific malignant and highly contagious fever characterized by acute inflammation of the mucous surfaces, affecting cattle, game, and, in a minor form, sheep." C. van Onselen, "Reactions to Rinderpest in Southern Africa 1896–97,"

Journal of African History 13, no. 3 (1972): 473. *Rinderpest* infects cloven-hoofed beasts, including cattle, buffaloes, large antelopes, deer, pigs, warthogs, giraffes, and wildebeests.

52. Olusoga and Erichsen, *The Kaiser's Holocaust*, 99–100; Sarkin, *Germany's Genocide*, 69.

53. Olusoga and Erichsen, *The Kaiser's Holocaust*, 103.

54. Bridgman and Worley, "Genocide of the Hereros," 22.

55. Dreschler, *Let Us Die Fighting*, 133–135; Zimmerer, "The Model Colony?," 26–27; Olusoga and Erichsen, *The Kaiser's Holocaust*, 117–119.

56. Dreschler, *Let Us Die Fighting*, 132. Sarkin offers an extended discussion of possible motives and interpretations by various writers in Sarkin, *Germany's Genocide of the Herrero*, 80–83.

57. Dreschler, *Let Us Die Fighting*, 142.

58. Quoted in ibid., 143 (emphasis added).

59. Literal translation is "protective force."

60. Hull, "Military Culture and the Production of the Final Solutions in the Colonies," 146.

61. Peter Duingan, *The Rulers of German Africa 1884–1914* (Palo Alto, CA: Stanford University Press, 1977), 27.

62. Olusoga and Erichsen, *The Kaiser's Holocaust*, 139.

63. Dreschler, *Let Us Die Fighting*, 149.

64. Quoted in ibid., 154.

65. See Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca, NY: Cornell University Press, 2005).

66. Ibid., 33.

67. Olusoga and Erichsen, *The Kaiser's Holocaust*, 143.

68. Dreschler, *Let Us Die Fighting*, 166. Samuel Maherero lived until 1923, but as an ordinary man, not a chief.

69. Olusoga and Erichsen, *The Kaiser's Holocaust*, 152–153.

70. Ibid., 155.

71. Quoted in Sarkin, *Germany's Genocide of the Herero*, 127.

72. Quoted in Hull, "Military Culture and the Production of the Final Solutions in the Colonies," 166.

73. Hull, *Absolute Destruction*, 65.

74. For a summary, see Bridgman and Worley, "Genocide of the Hereros," 32–33. Dreschler, *Let Us Die Fighting*, 211–213.

75. I. Goldblatt, *History of South West Africa, from the Beginning of the Nineteenth Century* (Cape Town: Juta, 1971), 142.

76. Dreschler, *Let Us Die Fighting*, 183–184.

77. For a brief description of his exploits, see J. R. Masson, "A Fragment of Colonial History: The Killing of Jakob Marengo," *Journal of Southern African Studies* 21, no. 2 (1995), 247–256.

78. Marenga's exploits became part of the so-called "Hottentot Elections" of 1907, which had as their centerpiece the question of colonial policy. See Ulrich van der Heyden, "The 'Hottentot Elections' of 1907" in *Genocide in German South-West Africa*, ed. Zimmerer and Zeller, 113–119.

79. Olusoga and Erichsen, *The Kaiser's Holocaust*, 178–179.

80. Ibid., 188–189.

81. Quoted in ibid., 183.

82. The argument was used by Kitchener in the Boer War.

83. Casper Wulff Erichsen, "Forced Labour in the Concentration Camp on Shark Island," in *Genocide in German South-West Africa*, ed. Zimmerer and Zeller, 85.

84. Jürgen Zimmerer, "War, Concentration Camps and Genocide in South-West Africa: The First German Genocide," in *Genocide in German South-West Africa*, ed. Zimmerer and Zeller, 53–55.

85. Ibid., 168–171; Dreschler, *Let Us Die Fighting*, 211–214.

86. See Nils Ole Oermann, *Mission, Church and State Relations in South West Africa Under German Rule: 1884–1915* (Stuttgart, DE: Steiner, 1999), 109–115.

87. Ibid., 113.

88. See Erichsen, "Forced Labour in the Concentration Camp on Shark Island," 84–99; also, Olusoga and Erichsen, "The Island of Death," in *The Kaiser's Holocaust*, 207–230.

89. Erichsen, "Forced Labour in the Concentration Camp on Shark Island," 92.

90. Quoted in ibid., 90.

91. Von Lindequist quoted in Dreschler, *Let Us Die Fighting*, 217.

92. See van der Hyden, "The 'Hottentot Election' of 1907," in *Genocide in German South-West Africa*, ed. Zimmerer and Zeller, for details.

93. Olusoga and Erichsen, *The Kaiser's Holocaust*, 244.

94. Ibid., 242–243.

CHAPTER 5

1. Vahakn N. Dadrian, "Genocide as a Problem of National International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications," *Yale Journal of International Law* 14, no. 2 (1989): 225.

2. See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (Princeton, NJ: Princeton University Press, 2000), 106–146, for an authoritative discussion of the trials and the politics surrounding them that mitigated their impact.

3. A transcript of the trial can be found online at http://www.cilicia.com/armo_tehlirian.html.

4. Andrew Bell-Fialkoff, "A Brief History of Ethnic Cleansing," *Foreign Affairs* 72, no. 3 (Summer 1993): 110.

5. John Kifner, "Armenian Genocide of 1915: An Overview," *New York Times* (April 17, 2014), http://www.nytimes.com/ref/timestopics/topics_armeniangenocide.html.

6. Roger W. Smith, Eric Markusen, and Robert Jay Lifton, "Professional Ethics and the Denial of Armenian Genocide," *Holocaust and Genocide Studies* 9, no. 1 (1995), 3.

7. Editorial, "Turkey, Armenia and Denial," *New York Times* (May 6, 2006). See also Taner Akçam, *The Young Turks' Crime against Humanity* (Princeton, NJ: Princeton University Press, 2012), 1–27.

8. See "The Mithradatic Wars," in *Appian's Roman History*, trans. Horace White (Cambridge, MA: The Loeb Classical Library, 1912), chs. 10:69–17:121, http://www.livius.org/ap-ark/appian/appian_mithridatic_00.html.

9. “The History of the Armenian Church,” The Eastern Diocese of the Armenian Church of America, http://www.armenianchurch-ed.net/our-church/history-of-the-church/history/.

10. As a note, Mount Ararat, presumably the place where Noah’s ark came to rest after the Great Flood, is in Old Armenia.

11. Albert Hourani, *A History of the Arab People* (Cambridge, MA: The Belknap Press, 1991) 207. For a description of the imperial bureaucratic structure of governance, see Hourani, *History*, 216–220; Halil Inalcík, *The Ottoman Empire: The Classical Age 1300–1600*, trans. N. Itzkowitz and C. Imber (London: Weidenfeld and Nicolson, 1973), 89–118.

12. Inalcík, *The Ottoman Empire*, 176.

13. Hourani argues that while the Ottomans did use the term “caliph,” it had only the implication that the sultan was more than a local ruler and used his power for purposes sanctioned by religion. Hourani, *History*, 221. Inalcík disagrees, noting that later sultans willingly embraced a broader idea of their religious role.

14. Hourani, *History*, 219. Some have suggested that the term “flock” has a literal meaning in the sense that the ordinary folks were there to be “shorn” for taxes at the will of the “shepherd.”

15. Inalcík, *The Ottoman Empire*, 179–185.

16. Ibid., 185.

17. For a discussion, see Kamel S. Abu Jaber, “The Millet System in the Nineteenth-Century Ottoman Empire,” *Muslim World* 57, no. 3 (1967), 212–223. For a discussion of the various usages in official Ottoman correspondence, see “Millet,” *Encyclopaedia of Islam*, 2nd ed., ed. P. Bearman, T. Bianquis, C. E. Bosworth, E. van Donzel, W. P. Heinrichs (Brill Online, 2014).

18. Abu Jaber, “Millet System,” 212–213.

19. Ibid., 213.

20. Ibid., 214.

21. Roderic H. Davison, “Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century,” *The American Historical Review* 59, no. 4 (1954): 845.

22. M. Şükrü Hanioğlu, *A Brief History of the Late Ottoman Empire* (Princeton, NJ: Princeton University Press, 2008), 3–4; Hourani, *History*, 249.

23. Inalcík, *The Ottoman Empire*, 1.

24. Hourani, *History*, 252

25. Hanioğlu, *A Brief History*, 54, 58–59.

26. Ibid., 22.

27. Ibid., 46–47.

28. See the classic study, M. S. Anderson, *The Eastern Question 1774–1923: A Study in International Relations* (London: Macmillan, 1966).

29. See Peter Mandler, “‘Race’ and ‘Nation’ in Mid-Victorian Thought,” in *History, Religion and Culture: British Intellectuals History 1750–1950*, ed. Stefan Collini, Richard Whatmore, and Brian Young (Cambridge, UK: Cambridge University Press, 2000), 226–244; Gerrit Gong, *The Standard of “Civilization” in International Society* (Oxford, UK: Clarendon Press, 1984).

30. Hanioğlu, *A Brief History*, 59.

31. “Tanzimat,” *Encyclopedia Britannica*, http://www.britannica.com/EBchecked/topic/582884/Tanzimat.

32. Donald Bloxham, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians* (Oxford, UK: Oxford University Press, 2005), 31.

33. Ibid., 14.

34. See Mark Levene, “Creating a Modern ‘Zone of Genocide’: The Impact of Nation and State Formation on Eastern Anatolia, 1878–1923,” *Holocaust and Genocide Studies* 12 (1998): 393–422.

35. Davison, “Turkish Attitudes,” 864.

36. Hanioğlu, *A Brief History*, 84.

37. Bloxham, *Great Game*, 16.

38. Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914* (Princeton, NJ: Princeton University Press, 2012), 129–138.

39. Ibid., 147–155.

40. Ibid., 137.

41. See Robert Devereux, *The First Ottoman Constitutional Period, a Study of the Midhat Constitution and Parliament* (Baltimore: The Johns Hopkins University Press, 1963).

42. L. C. B. Seaman, *From Vienna to Versailles* (New York: Harper & Row, 1963), 1. The second Congress of Berlin in 1884 dealt with colonial issues—primarily the division of Africa, but did ratify Bulgaria’s claim to Eastern Rumelia.

43. See Anderson, *The Eastern Question*, ch. 8, for an extended analysis of Great Power politics.

44. Hanioğlu, *A Brief History*, 125.

45. Ibid., 142–143.

46. See Osgan Mekhitarian and Vahan Ohanian, eds., *Armenians at the Twilight of the Ottoman Era: News Reports from the International Press, vol 1: The New York Times 1890–1914* (Genocide Documentation and Research Center, 2011), http://www.armeniandiaspora.am/images/menus/384/armenians_twilight.pdf.

47. Donald Quataert, *The Ottoman Empire, 1700–1922* (Cambridge, UK: Cambridge University Press, 2000), 115–116.

48. Ibid.

49. Christopher Walker, *Armenia: The Survival of a Nation* (New York: St. Martin’s Press, 1980), 94–98.

50. Louise Nalbandian, *The Armenian Revolutionary Movement: The Development of Armenian Political Parties through the Nineteenth Century* (Berkeley: University of California Press, 1963), 151.

51. Ibid.

52. Peter Balakian, *The Burning Tigris: The Armenian Genocide and America’s Response* (New York: Harper Collins, 2003), 44, 50–51.

53. See Janet Klein, *The Margins of Empire: Kurdish Militias in the Ottoman Tribal Zone* (Princeton, NJ: Princeton University Press, 2011), ch. 1, for an extensive discussion of the rationales.

54. Quoted in Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven, CT: Yale University Press, 2007), 398.

55. Quoted in Balakian, *The Burning Tigris*, 56.

56. For the political maneuvering among the European powers, and their relations with the Sublime Porte, see Rodogno, *Against Massacre*, 191–202. The classic

study of the era is William L. Langer, *The Diplomacy of Imperialism, 1890–1902*, 2 vols. (New York: Alfred A. Knopf, 1935).

57. Rodogno, *Against Massacre*, 191.

58. The term comes from the name of the gate one must pass through to enter the complex.

59. Vahakn N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, 3rd rev. ed. (Providence, RI: Berghahn Books, 1995), 120.

60. Balakian, *Burning Tigris*, 59.

61. Rodogno, *Against Massacre*, 199.

62. Bloxham, *Great Game*, 52.

63. Balakian, *Burning Tigris*, 61.

64. Dadrian, *History*, 144.

65. Balakian, *Burning Tigris*, 106–107.

66. Dadrian, *History*, 146.

67. Feroz Ahmad, *The Young Turks: The Committee of Union and Progress in Turkish Politics 1908–1914* (Oxford, UK: Oxford University Press, 1969), 8–10.

68. Ibid., 12–13.

69. Bloxham, *Great Game*, 61.

70. N. Naim Turfan, *Rise of the Young Turks Politics, the Military and Ottoman Collapse* (London: I. B. Taurus, 2000), 143.

71. Erik Jan Zürcher, "The Young Turks: Children of the Borderlands?" *International Journal of Turkish Studies* 9, no. 1, I, 2 (2003): 275–285; Bloxham, *Great Game*, 59.

72. Ahmad, *The Young Turks*, 15–17.

73. Dadrian, *History*, 179–183, 193; Bloxham, *Great Game*, 61.

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75. Ahmad, *The Young Turks*, 61–62.

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82. Taner Akçam, *The Young Turks' Crime against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (Princeton, NJ: Princeton University Press, 2012), 31.

83. Quoted in Akçam, *The Young Turks*, 45.

84. Ibid., 47

85. Ibid., 68–69, 99–113.

86. Quoted in Uriel Heyd, *Foundations of Turkish Nationalism: The Life and Teachings of Ziya Gökalp* (London: Luzac, 1950), 63; see also Ziya Gökalp, *Turkish Nationalism and Western Civilization* (London: George Allen & Unwin, 1959).

87. Balakian, *Burning Tigris*, 163.

88. Ibid., 384; Bloxham, *Great Game*, 63–64.

89. Edward J. Erickson, *Ordered to Die: A History of the Ottoman Army in the First World War* (Westport, CT: Greenwood, 2001), 10–12.

90. Reynolds, *Shattering Empires*, 121. Note that some dispute exists over the exact date.

91. Ugur Ümit Üngör, *The Making of Modern Turkey: Nation and State in Eastern Anatolia, 1913–1950* (Oxford, UK: Oxford University Press, 2012), 58. This differs somewhat from Reynolds, *Shattering Empires*, 121.

92. See Guenter Lewy, *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide* (Salt Lake City: University of Utah Press, 2005), 226–228.

93. For Ottoman expectations concerning the benefits of the alliance with Germany, see Hanioğlu, *A Brief History*, 178–179.

94. Erickson, *Ordered to Die*, 7–9.

95. Akçam, *A Shameful Act*, 139.

96. For elaboration of this point, see Primo Levi, "The Gray Zone," ch. 2, in his book, *The Drowned and the Saved* (New York: Simon and Schuster, 1988).

97. See Donald Bloxham, "The Armenian Genocide of 1915–1916: Cumulative Radicalization and the Development of a Destruction Policy," *Past and Present* 181 (2003): 147, and accompanying notes.

98. Akçam, *The Young Turks*, 102.

99. Richard L. Rubenstein, "Jihad and Genocide: The Case of the Armenians," in *Confronting Genocide Judaism, Christianity, Islam*, ed. Steven Leonard Jacobs (Lanham, MD: Lexington Books, 2009), 125.

100. Ibid.

101. Phrase attributed to Talât Paşa; quoted in Akçam, *The Young Turks*, 134.

102. Akçam, *The Young Turks*, 131.

103. Richard Rubenstein, *The Cunning of History: The Holocaust and the American Future* (New York: Harper & Row, 1985), 11–12.

104. Balakian, *Burning Tigris*, 180.

105. Akçam, *The Young Turks*, 175.

106. Bloxham, *Great Game*, 76–77.

107. Balakian, *Burning Tigris*, 233.

108. Ibid., 234.

109. Akçam, *The Young Turks*, 159.

110. Zürcher, "Ottoman Labour Battalions in World War I."

111. Richard G. Hovanissian, "The Historical Dimension of the Armenian Question, 1878–1923," in *The Armenian Genocide in Perspective* (New Brunswick, NJ: Transaction Publishers, 1987), 29.

112. Henry Morgenthau, *Ambassador Morgenthau's Story* (Garden City, NY: Doubleday, Page & Company), ch. 18, 307, http://net.lib.byu.edu/estu/wwi/comment/morgenthau/Morgen18.htm.

113. Rubenstein, "Jihad and Genocide: The Case of the Armenians," 130.

114. Phrase taken from Akçam, *The Young Turks*, 198.

115. Bloxham, "Armenian Genocide," 180.

116. Leslie A. Davis, *The Slaughterhouse Province: An American Diplomat's Report on the Armenian Genocide, 1915–1917*, ed. Susan Blair (New Rochelle, NY: A. D. Caratzas, 1989), 83.

117. Ibid., 8, 175.

118. Ibid., 175.

119. Morgenthau, *Ambassador Morgenthau's Story*.

120. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79–81.

121. Akçam, *The Young Turks*, 290.

122. Ibid., 291.

123. See also Ara Sarafian, "The Absorption of Armenian Women and Children into Muslim Households as a Structural Component of the Armenian Genocide," in *In God's Name: Genocide and Religion in the Twentieth Century*, ed. Omer Bartov and Phyllis Mack (Providence, RI: Berghahn Books, 2001), 209–221.

124. Ibid., 242–248.

125. Reynolds, *Shattered Empires*, 189–190.

126. Bloxham, *Great Game*, 149–150.

127. Ibid., 164.

128. R. J. Rummel, *Death by Government* (New Brunswick, NJ: Transaction Books, 1994), 234.

CHAPTER 6

1. Heinrich Himmler, Speech before SS Group Leaders, Posen, Poland (October 4, 1943), http://history.hanover.edu/courses/excerpts/111him.html.

2. The *Oxford Dictionary* gives the modern, secular definition of the term "holocaust" as "destruction or slaughter on a mass scale," with specific reference to "the mass murder of Jews under the German Nazi regime during the period 1941–45." The dictionary also references the older religious meaning: "a Jewish sacrificial offering that is burned completely on an altar," http://www.oxforddictionaries.com/us/definition/american_english/holocaust.

3. R. J. Rummel argues that the Nazis murdered close to 21 million people in all. R. J. Rummel, *Death by Government* (New Brunswick, NJ: Transaction Books, 1994), 111.

4. Sybil Milton, "Holocaust: The Gypsies," in *Century of Genocide: Critical Essays and Eyewitness Accounts*, 3rd ed., ed. Samuel Totten and William S. Parsons (London: Routledge, 2009), 163. See also Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986).

5. Christopher R. Browning, *The Path to Genocide: Essays on Launching the Final Solution* (Cambridge, UK: Cambridge University Press, 1992), ix.

6. Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (London: Routledge, 2011), 233.

7. Christopher Browning, *Origins of the Final Solutions: The Evolution of Nazi Jewish Policy, September 1939–March 1942* (Lincoln: University of Nebraska Press, 2004), 1.

8. Zygmunt Bauman, *Modernity and the Holocaust* (Ithaca, NY: Cornell University Press, 2000), 13.

9. Eric D. Weitz, *Weimar Germany: Promise and Tragedy* (Princeton, NJ: Princeton University Press, 2007), 39.

10. Gerhard Rempel, "The German Revolution of 1918," http://www.johndclare.net/Rempel_Weimar18.htm.

11. Weitz, *Weimar Germany*, 13.

12. See Ben Fowkes, *Communism in Germany Under the Weimar Republic* (London: Palgrave Macmillan, 1984).

13. Weitz, *Weimar Germany*, 33; see also Dirk Schumann, *Political Violence in the Weimar Republic, 1918–1933: Fight for the Streets and Fear of Civil War*, trans. Thomas Dunlap (Oxford, NY: Berghahn Books, 2009), 3–35.

14. Weitz, *Weimar Germany*, 27.

15. Sally Marks, "Smoke and Mirrors: In Smoke-Filled Rooms and the Gallerie des Glaces," in *The Treaty of Versailles: A Reassessment after 75 Years*, ed. Manfred F. Boemeke, Gerald D. Feldman, and Elisabeth Gläser (Cambridge, UK: Cambridge University Press, 1998), 357.

16. Schumann, *Political Violence in the Weimar Republic*, 35–53; A. J. Nicholls, *Weimar and the Rise of Hitler*, 4th ed. (New York: St. Martin's, 2000), 69–72.

17. Marks, "Smoke and Mirrors," 358.

18. Ruth Henig, *The Weimar Republic: 1919–1933* (London: Routledge, 1998), 19.

19. Weitz, *Weimar Germany*, 83–84.

20. Weimar Elections 1928–1932, History Learning Site, http://www.historylearningsite.co.uk/weimar_elections_1928_1932.htm.

21. Note, for example, in the 1928 election, 40 parties fielded candidates (one received only 286 votes). Of course, not all of these identified with the right, but the numbers give some indication of the fragmented nature of the political landscape.

22. All election statistics from Dieter Nohlen and Philip Stover, eds., *Elections in Europe; A Data Handbook* (Baden-Baden, DE: Nomos Verlagsgesellschaft, 2010).

23. Henig, *Weimar Republic*, 55.

24. Ibid., 56.

25. For an interesting discussion of the historical varieties of anti-Semitism, see Albert S. Lindemann and Richard S. Levy, eds., *Antisemitism: A History* (Oxford, UK: Oxford University Press, 2010).

26. See ibid.

27. See David A. Brenner, *German-Jewish Popular Culture before the Holocaust: Kafka's Kitsch* (London: Routledge, 2008).

28. Eric D. Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton, NJ: Princeton University Press, 2003), 47.

29. Richard S. Levy, *The Downfall of the Anti-Semitic Parties in Imperial Germany* (New Haven, CT: Yale University Press, 1975).

30. Weitz, *Weimar Germany*, 96.

31. Detlev J. K. Peukert, *The Weimar Republic* (New York: Hill & Wang, 1993), 36.

32. Weitz, *Weimar Germany*, 98.

33. Browning, *The Origins of the Final Solution*, 8.

34. William L. Shirer, *The Rise and Fall of the Third Reich* (New York: Simon & Schuster, 960), 130–131.

35. Per Hinrichs, "Revoking the Führer's Passport: Hitler May Be Stripped of German Citizenship." *Spiegel Online International* (March 12, 2007), http://www.spiegel.de/international/revoking-the-fuehrer-s-passport-hitler-may-be-stripped-of-german-citizenship-a-471168.html.

36. Ibid.

37. Robert Gellately, *Backing Hitler: Consent & Coercion in Nazi Germany* (Oxford, UK: Oxford University Press, 2001), 1–2, 9–10; for an excellent short discussion of the authoritarian tradition in Germany, see Browning, *Ordinary Men*, 216–221.

38. Donald Bloxham, *The Final Solution: A Genocide* (Oxford, UK: Oxford University Press, 2009), 147–155.

39. Nicholls, *Weimar and the Rise of Hitler*, 158.

40. Peter Fritzsche, *Germans into Nazis* (Cambridge, MA: Harvard University Press, 1998), 198–199, 203.

41. Gellately, *Backing Hitler*, 4.

42. Ulrich Hebert quoted in Gellately, *Backing Hitler*, 5. See also Peter Fritzsche, "January 1933," *Germans into Nazis*, 137–214.

43. Doris L. Bergen, "Antisemitism in the Nazi Era," in *Antisemitism: A History*, ed. Albert S. Lindemann and Richard S. Levy (Oxford, UK: Oxford University Press, 2010), 203.

44. Henry Ashby Turner Jr., *Hitler's Thirty Days to Power: January 1933* (New York: Addison-Wesley, 1996), 2–3.

45. Nicholls, *Weimar and the Rise of Hitler*, 159.

46. Turner, *Hitler's Thirty Days*, 33.

47. Henig, *Weimar Republic*, 75.

48. Nicholls, *Weimar and the Rise of Hitler*, 168.

49. Ibid.

50. As a note, at the time of the crime, arson did not carry the death penalty. In a snapshot of things to come, by violating a fundamental principle of German law (and law in general), the death penalty was added to have retroactive effect (an *ex post facto* amendment to the law).

51. See the review and exchanges in the *London Review of Books*, Richard J. Evans, "The Conspiracists," *London Review of Books* 36:9 (May 8, 2014), 3–9: review of Benjamin Carter Hett, *Burning the Reichstag: An Investigation into the Third Reich's Enduring Mystery* (Oxford, UK: Oxford University Press, 2014).

52. Marion A. Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* (New York: Oxford University Press, 1998), 53.

53. Bergen, "Antisemitism in the Nazi Era," 201.

54. See Martin Gilbert, *The Holocaust: A History of the Jews of Europe during the Second World War* (New York: Henry Holt, 1985), 41; United States Holocaust Memorial Museum, "Germany: Jewish Population in 1933," *Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005276.

55. United States Holocaust Memorial Museum, "German Jewish Refugees," *Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005468; see also Yehuda Bauer, "The Holocaust," in *Encyclopedia of Genocide*, vol. 1, ed. Israel W. Charny (Santa Barbara, CA: ABC-CLIO, 1999), 312.

56. Bauer, "The Holocaust," 312.

57. Karl A. Schleunes, *The Twisted Road to Auschwitz: Nazi Policy toward German Jews, 1933–1939* (Urbana: University of Illinois Press, 1970), 186.

58. Norman Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe* (Cambridge, MA: Harvard University Press, 2001), 68.

59. Ibid., 69–70.

60. Bauer, *The Holocaust*, 312.

61. Donald L. Niewyk, "Holocaust: The Genocide of the Jews," in *Century of Genocide*, ed. Totten and Parsons, 130.

62. As an aside, see Michael Walzer's marvelous essay, "A Day in the Life of a Socialist Citizen" in his *Obligations: Essays on War, Disobedience and Citizenship* (Cambridge, MA: Harvard University Press, 1970), 229–240.

63. See chapter 3 on Sparta. See also Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven, CT: Yale University Press, 2007), 45–49, 421.

64. Quoted in Robert J. Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986), 22.

65. Ibid., 25. Lifton notes that some concern existed that degenerate individuals might seek sterilization to pursue "unrestrained sexual gratification." Ibid., 26.

66. Ibid., 63.

67. Hugh Gregory Gallagher, "Holocaust: The Genocide of Disabled People," in *Century of Genocide*, ed. Totten and Parsons, 213, quoting Klaus Dörner.

68. Gallagher, "Holocaust: The Genocide of Disabled People," 212.

69. Ibid., 214.

70. Weitz, *A Century of Genocide*, 115.

71. Until the Nazis appropriated the idea, "Aryan" described a language group, not a "race." Similarly, "semitic" also describes a language group that included Arabic as well as Hebrew.

72. Quoted in Saul Friedländer, *Nazi Germany and the Jews: The Years of Persecution, 1933–1939*, vol. 1 (New York: HarperCollins, 1977), 152.

73. Himmler, "Speech before SS."

74. Quoted in Naimark, *Fires of Hatred*, 59.

75. For an exposition of the place of agriculture and land in Nazi ideology, see Kiernan, *Blood and Soil*, 422–427.

76. Bergen, "Antisemitism in the Nazi Era," 198–199.

77. Weitz, *A Century of Genocide*, 108.

78. Friedländer, *Nazi Germany and the Jews*, 73–112.

79. Quoted in Weitz, *A Century of Genocide*, 111–112.

80. Noah William Isenberg, *Between Redemption and Doom: The Strains of German-Jewish Modernism* (Lincoln: University of Nebraska Press, 2008), 91–93.

81. Ernst Hiemer, "*So kamen die Juden zu uns* [How the Jews got here]," *Der Giftpilz* [The Poisonous Mushroom] (Nuremberg, DE: Verlag der Stürmer, 1938). "Just as it is often hard to tell a toadstool from an edible mushroom, so too it is often very hard to recognize the Jew as a swindler and criminal." Electronic version, German Propaganda Archive, Calvin College, http://research.calvin.edu/german-propaganda-archive/thumb.htm.

82. Turner, *Hitler's Thirty Days*, 36.

83. Ron Rosenbaum, *Explaining Hitler: The Search for the Origins of His Evil* (New York: Random House, 1998), xii, xi.

84. See chapter 3. Also see the essays by Richard J. Goslan, William D. Rubinstein, Heinz-Dietrich Löwe, and István Deák in Lindemann and Levy, *Antisemitism*.

85. Richard S. Goslan, "Antisemitism in Modern France: Dreyfus, Vichy, and Beyond," in *Antisemitism*, ed. Lindemann and Levy, 137.

86. István Deák, "Antisemitism in Eastern Europe," in *Antisemitism*, ed. Lindemann and Levy, 230.

87. Jones, *Genocide*, 252.

88. Bloxham, *Final Solution*, 143.

89. Schleunes, *Twisted Road*, 153–154, 167–168, 249.

90. Ibid., 130.

91. Ibid., 158.

92. Bloxham, *The Final Solution*, 150.

93. Gellately, *Backing Hitler*, 147.

94. Schleunes, *Twisted Road*, 182.

95. Weitz, *A Century of Genocide*, 124.

96. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: HarperCollins, 1992), 186.

97. For a catalog of attacks on the Jewish community from 1933 to 1939, see Gilbert, *The Holocaust*, 32–83.

98. Gellately, *Backing Hitler*, 126.

99. For a comprehensive treatment, see Alan E. Steinweis, *Kristallnacht 1938* (Cambridge, MA: Belknap, 2009).

100. Gellately, *Backing Hitler*, 129–130.

101. Not to be confused with the RuSHA, the *Rasse-und Siedlungshauptamt*-SS (SS Race and Settlement Main Office), which was the organization responsible for "safeguarding the racial purity of the SS" within Nazi Germany.

102. For an in-depth study of Heydrich, see Robert Gerwarth, *Hitler's Hangman: The Life of Heydrich* (New Haven, CT: Yale University Press, 2012).

103. See Richard Rhodes, *Masters of Death: The SS-Einsatzgruppen and the Invention of the Holocaust* (New York: Vintage, 2003).

104. Bergen, "Antisemitism in the Nazi Era," in *Antisemitism*, ed. Lindemann and Levy, 205.

105. Quoted in Browning, *Origins of the Final Solution*, 46.

106. Naimark, *Fires of Hatred*, 67.

107. Bloxham, *Final Solution*, 175.

108. German army—name changed from Reichswehr in 1935 with the new conscription law.

109. Browning, *Origins of the Final Solution*, 19–20.

110. Ibid., 21.

111. Governorate: an administrative division of a country. See Dictonary.com, http://dictionary.reference.com/browse/governorate. Note that this is the literal translation of *gouvernement* from German.

112. John Keegan, *The Second World War* (New York: Viking, 1989), 43.

113. For a brief summary of the grander long-term plan for the area of the Ukraine and Russian borderlands, *Genaralplan Ost*, see Bloxham, *Final Solution*, 180–181, and Kiernan, *Blood and Soil*, 416–430.

114. Bloxham, *Final Solution*, 176.

115. Robert L. Koehl, *RKFDV: German Resettlement and Population Policy, 1939–1945: A History of the Reich Commission for the Strengthening of Germandom* (Cambridge, MA: Harvard University Press, 1957), 89.

116. Ibid., 129.

117. Germans did not use the term “ghetto.” The areas were called “Jewish quarters” (*Jüdisches Wohnbezirk*).

118. Browning, *Origins of the Final Solution*, 111–113. For a thorough discussion of the issues, see ibid., 111–168.

119. Ibid., 167.

120. Keegan, *The Second World War*, 174.

121. Donald Bloxham and Tony Kushner, *The Holocaust: Critical Historical Approaches* (Manchester, UK: Manchester University Press, 2005), 143.

122. Keegan, *The Second World War*, 186.

123. Ben Shepherd, *War in the Wild East: The German Army and the Soviet Partisans* (Cambridge, MA: Harvard University Press, 2004), 58–59.

124. Weitz, *A Century of Genocide*, 128–129.

125. See chapter 3, and Raul Hilberg, *The Destruction of the European Jews*, 3rd ed. (New Haven, CT: Yale University Press, 2004), 327–334.

126. Lifton, *The Nazi Doctors*, 160.

127. The SS-*Sonderkommandos* were ad hoc units formed to undertake various special operations. They should not be confused with the *sonderkommandos*, who were workers recruited from death camp prisoners (almost all Jewish) who were forced to take care of the disposal of gas chamber victims during the Holocaust.

128. Bloxham, *Final Solution*, 216.

129. Browning, *Origins of the Final Solution*, 374.

130. For a good list of the various types of camps and articles about them, see United States Holocaust Museum, “Articles about Camps,” *Online Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007398.

131. United States Holocaust Museum, “Nazi Camps,” *Online Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005144. For example, beginning in 1940, the Nazis had established 16 forced labor camps in the Lublin district of Poland.

132. See Martin Winstone, *The Holocaust Sites of Europe: An Historical Guide* (London: I. B. Taurus, 2010).

133. Lifton, *The Nazi Doctors*, 134–136.

134. See Wollheim Memorial, “What Was I. G. Auschwitz Meant to Produce?” http://www.wollheim-memorial.de/en/was_sollte_fabrik_produzieren.

135. Quoted in Saul Friedländer, *The Years of Extermination: Nazi Germany and the Jews, 1939–1945* (New York: HarperCollins, 2007), 495.

136. Lifton, *The Nazi Doctors*, 17.

137. Browning, *Origins of the Final Solution*, 413.

138. United States Holocaust Memorial Museum, “SS and the Holocaust,” *Online Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007403.

139. United States Holocaust Memorial Museum, “Auschwitz,” *Online Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005189.

140. Friedländer, *Years of Extermination*, 497.

141. Winstone, *The Holocaust Sites of Europe: An Historical Guide*, 209–310.

142. Bloxham, *Final Solution*, 235–237.

143. Ibid., 239.

144. Friedländer, *Years of Extermination*, 523–524; United States Holocaust Memorial Museum, "Warsaw Ghetto Uprising," *Online Holocaust Encyclopedia*, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005188.

145. Friedländer, *Years of Extermination*, 557–558.

146. Ibid., 559.

147. Weitz, *A Century of Genocide*, 142.

148. Ian Kershaw, *Hitler 1889–1936: Hubris* (London: Penguin: 1999), ch. 13.

149. Bloxham, *Final Solution*, 268, 271.

150. Lifton, *The Nazi Doctors*, 75.

151. Rhodes, *Masters of Death*, 164.

152. Browning, *Ordinary Men*, 129–131.

CHAPTER 7

1. Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Picador, 1998), 6.

2. Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford, UK: Oxford University Press, 2009), 261.

3. René Lemarchand, "The 1994 Genocide," in *Century of Genocide: Critical Essay and Eyewitness Accounts*, 3rd ed., ed. Samuel Totten and William S. Parsons (New York & London: Routledge, 2009), 483.

4. Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001), 7. At one point, more than 90,000 had been arrested, waiting some disposition of their status.

5. René Lemarchand, "The Burundi Genocide," in *Century of Genocide*, ed. Totten and Parsons, 323.

6. Ibid., 324.

7. Eric J. Hobsbawm, "Introduction: The Invention of Tradition," in *The Invention of Tradition*, ed. Eric J. Hobsbawn and Terence O. Ranger (Cambridge, UK: Cambridge University Press, 1983), 1–14; Ernest Renan, *Qu'est-ce qu'une nation?* [What is a nation?] Lecture, Sorbonne, March 11, 1882, Paris: Calman Lévy, 1882, http://books.google.com/books?hl=en&lr=&id=IngGAAAAQAAJ&oi=fnd&pg=PA1&dq=Ernest+Renan,+What+is+a+Nation%3F&ots=xyf6ro8yeD&sig=iDm3lHbB-oEg90Tsxujexp1nA3E#v=onepage&q=Ernest%20Renan%2C%20What%20is%20a%20Nation%3F&f=false.

8. Alison Des Forges, *Leave None to Tell the Story* (New York: Human Rights Watch, 1999), 31.

9. Nigel Watt, *Burundi: Biography of a Small African Country* (New York: Columbia University Press, 2008), 30.

10. Lemarchand, "The Burundi Genocide," 324–325.

11. Gourevitch, *We Wish to Inform You*, 48.

12. Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985), 115.

13. Mahmood Mamdani, "From Conquest to Consent as the Basic of State Formation: Reflections on Rwanda," *New Left Review* 216 (1996): 8.

14. Mahmood Mamdani, *When Victims Become Killers*, 59.

15. See Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (New York: Picador, 2003); also Alison Des Forges, *Leave None to Tell*, 6–7.

16. Mamdani, *When Victims Become Killers*, 41.

17. For a lengthy discussion of this point, see René Lemarchand, *Burundi: Ethnic Conflict and Genocide* (Cambridge, UK: Cambridge University Press, 1996), 4–12.

18. Ibid., 4.

19. Ibid., 34.

20. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 2006).

21. Lemarchand, *Burundi*, 5.

22. Marcel d'Hertefelt, *Les clans du Rwanda ancien: Elément d'ethnosociologie and d'ethnohistoire*, Annales, Serié in 80, Sciences Humaine, no. 70 (Tervuren: Musée Royal de l'Afrique, 1970).

23. See Marcel d'Hertefelt, "Le Rwanda," in *Les anciens royaumes de la zone interlacustre méridionale: Rwanda, Burundi, Buha*, ed. Marcel d'Hertefelt, Albert A. Trouwborst, and J. H. Scherer (Tervuren: Musée Royal de l'Afrique Centrale, 1962), 9–111; Jan Vansina, *Antecedents to Modern Rwanda: The Nyiginya Kingdom* (Madison: University of Wisconsin Press, 2004).

24. Christian P. Scherrer, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence, and Regional War* (Westport, CT: Praeger, 2002), 19.

25. Lemarchand, *Burundi*, 10–11.

26. Watt, *Burundi: Biography of a Small African Country*, 27.

27. Lemarchand, *Burundi*, 10.

28. Albert A. Trouwborst, "*Le Burundi*," in *Les anciens royaumes*, ed. d'Hertefelt et al. (trans. by author), 145. Trouwborst also notes that there were many princes who never filled a position as chief.

29. Ibid., 145.

30. Ibid., 146.

31. Lemarchand, *Burundi*, 36.

32. d'Hertefelt, "*Le Rwanda*," 61. Note that d'Hertefelt accepts the Tutsi conquest scenario, but that does not color his discussion of the economic and political system.

33. On the hereditary nature of the kingship, see d'Hertefelt, "*Le Rwanda*," 39.

34. Ibid., 62–65; Gérard Prunier, *The Rwandan Crisis: History of a Genocide* (New York: Columbia University Press, 1995), 11–12.

35. Catherine Newbury, *The Cohesion of Oppression Clientship and Ethnicity in Rwanda, 1860–1960* (New York: Columbia University Press, 1998), 95.

36. Mamdani, *When Victims Become Killers*, 66.

37. Jean Népomucène Nkurikiyimfura, *Le gros bétail et la société Rwandaise: Évolution historique: des XIIe–XIVe siècles à 1958* (Paris: L'Harmattan, 1994), 96–97 (trans. by author).

38. Jan Vansina, *La Légende du Passé: Traditions Orales du Burundi* (Tervuren: Musée royal de l'Afrique Central, 1972), 219.

39. Roger Botte, "Rwanda and Burundi, 1889–1930: Chronology of a Slow Assassination, Part 1," *The International Journal of African Historical Studies* 18, no. 1 (1985), 53. On earlier impact of disease and famine: "*Les famines and les épidemiés qui causaient parfois une forte mortalité dans les collectivités installés sur des terres une vacantes*," Nkurikiyimfura, *Le gros bétail et la société Rwandaise*, 97.

40. Botte, "Rwanda and Burundi," 54.

41. Jacques Vanderlinden, *Pierre Ryckmans, 1891–1959: Coloniser dans l'honneur* (Brussels: De Boeck Université, 1994), 129 (trans. by author).

42. Quoted/translated in Prunier, *The Rwanda Crisis*, 11.

43. Mamdani, *When Victims Become Killers*, 87. Mamdani also argues that only in Rwanda did the notion take hold that the Tutsi were a "race apart" from the majority.

44. Chrétien claims that when Belgium left in 1959, 43 chiefs out of 45 were Tutsi as were 549 out of 559 subchiefs. Jean-Pierre Chrétien, "*Hutu et Tutsi au Rwanda et au Burundi*," in *Au coeur de l'ethnie: Ethnie, tribalisme et état en Afrique*, ed. Jean-Loupe Amselle and Elika M'Bololo (Paris: La Découverte, 1999), 145.

45. Gourevitch, *We Wish to Inform You*, 57.

46. See *The Prosecutor Versus Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Chamber I, Judgment (2 September 1998), Case No. ICTR-96-4-T. paras. 81–84.

47. The literature on Burundi is rather sparse. The following section draws primarily on Lemarchand, *Burundi*, 47–57; Scherrer, *Genocide and Crisis in Central Africa*, 30–32; Chrétien, "*Hutu et Tutsi au Rwanda et au Burundi*," 129–165; Jean-Pierre Chrétien, *Burundi, l'histoire retrouvée: 25 ans de métier d'historien en Afrique* (Paris: Karthala, 1993), 417–458. Note that most contemporary sources (including those in French) cite Lemarchand and Chrétien as their primary sources.

48. "Burundi—Political Parties," *Encyclopedia of the Nations*, http://www.nationsencyclopedia.com/Africa/Burundi-POLITICAL-PARTIES.html.

49. Also, Parti de l'Union and du Progrés National.

50. See in particular, General Assembly Resolution 1605 XV (April 21, 1961): Question of the Future of Ruanda-Urundi, http://www.worldlii.org/int/other/UNGA/1961/18.pdf.

51. Chrétien, "*Hutu et Tutsi au Rwanda et au Burundi*," 160–161; Lemarchand, "The Burundi Genocide," 326.

52. Lemarchand, *Burundi*, 70; Jean-Pierre Chrétien and Jean-François Dupauier, *Burundi 1972: Au bord des génocides* (Paris: Karthala, 2007), 21.

53. Lemarchand, *Burundi*, 79.

54. Ibid., 80.

55. For an analysis of similar intra-Sinhalese rivalry in Sri Lanka, see James Larry Taulbee et al., *Norway's Peace Policy: Soft Power in a Turbulent World* (London: Palgrave Macmillan, 2014), 105–139.

56. Ibid., 327. For a long account, see Chrétien and Dupaquier, *Burundi 1972*, 97–107.

57. Cited in Lemarchand, *Burundi*, 103; Chrétien and Dupaquier, *Burundi 1972*, 139–149; Watt, *Burundi*, 34–36.

58. Chrétien and Dupaquier, *Burundi 1972*, 241 (trans. by author).

59. Lemarchand, "The Burundi Genocide," 333.

60. Jean-Jacques Marquet and Marcel d'Hertefelt, *Élections en société féodale: Une étude sur l'introduction du vote populaire au Ruanda-Urundi* (Brussels: Académie Royale des Sciences Coloniales, 1959), 23, 26 (trans. by author), http://www.kaowarsom.be/documents/MEMOIRES_VERHANDELINGEN/Sciences_morales_politique/Hum.Sc.%28NS%29_T.XXI,2_MAQUET%20J.J.%20et%20D%27HERTEFELT%20M._Elections%20en%20soci%C3%A9t%C3%A9%20f%C3%A9odale_1959.pdf.

61. Ibid., 49.

62. Mamdani, *When Victims Become Killers*, 117.

63. Prunier, *The Rwanda Crisis*, 41–43.

64. Ian Linden, *Church and Revolution in Rwanda* (Manchester, UK: Manchester University Press, 1977), 7.

65. Prunier, *The Rwandan Crisis*, 46.

66. Mamdani, *When Victims Become Killers*, 115.

67. *Note sur l'aspect social du probléme racial indigéne au Rwanda*, http://jkanya.free.fr/manifestebahutu240357.pdf.

68. Ernest Renan, *Qu'est-ce qu'une nation?* [What is a nation?]; See also Benedict Anderson, *Imagined Communities*, rev. ed. (London: Verso, 2006), 203–206.

69. Marquet and d'Hertefelt, *Élections en société féodale*, 86–87, and n. 1.

70. Mamdani, *When Victims Become Killers*, 119.

71. For the argument here, see Catherine Newbury, *The Cohesion of Oppression*, 199.

72. J. J. Carney, *Rwanda before the Genocide: Catholic Politics and Ethnic Discourse in the Late Colonial Era* (Oxford, UK: Oxford University Press, 2014), 113. See also Filip Reyntjens, *Pouvoir et droit au Rwanda: Droit public et evolution politique, 1916–1973* (Tervuren, BE: Musée Royal de l'Afrique, 1985), 250–260.

73. For a detailed account, see Pierre Tabara, *Afrique, la face cacheé* (Paris: Pensée Universelle, 1993), 179–185; Prunier argues that this was because of the "fiery rhetoric" of APSOMA's leader; Prunier, *The Rwanda Crisis*, 48–49.

74. Guy (Guillaume) Logiest, *Mission au Rwanda: Un blanc dans la bagarre Tutsi-Hutu* (Brussels, BE: Hatier, 1988), 135 (trans. by author). From 1959–1962 (independence), Logiest served as special military resident and high representative (1962) of Rwanda.

75. Quoted in Godfrey Mwakikagile, *Peace and Stability in Rwanda and Burundi: The Road Not Taken* (Dar es Salaam, TZ: New Africa Press, 2013), 148.

76. As an important note, despite the infusion of Hutu priests, the church hierarchy remained predominantly Tutsi.

77. For the best account, see Lemarchand, *Rwanda and Burundi*, 198–206.

78. Young, "Zaire, Rwanda and Burundi," 738.

79. Minorities at Risk Project: Chronology for Hutus in Burundi, http://www.cidcm.umd.edu/mar/chronology.asp?groupId=51601.

80. Gérard Prunier, *Burundi: A Manageable Crisis?* WRITE-NET (1994), 16, http://repositories.lib.utexas.edu/handle/2152/5200.

81. United Nations, International Commission of Inquiry for Burundi (2002), the report in §496 labels the massacres as genocide. Text: http://www.usip.org/sites/default/files/file/resources/collections/commissions/Burundi-Report.pdf.

82. See Filip Reyntjens and Stef Vandeginste, "Burundi: Évolution politique en 1996–1997," University of Antwerp (December 1995), http://www.ua.ac.be/objs/00110511.pdf; Watt, *Burundi*, 57–58.

83. Scherrer, *Genocide and Crisis*, 234–235. See Ahmedou Ould-Abdallah, *Burundi on the Brink 1993–95: A UN Special Envoy Reflects on Preventive Diplomacy* (Washington, DC: United States Institute of Peace, 2000).

84. Prunier, *The Rwanda Crisis*, 77–78.

85. Gourevitch, *We Wish to Inform You*, 80–81; Prunier, *The Rwanda Crisis*, 85–87.

86. André Guichaoua, *Le problème des refugies rwandais et des populations banyarwanda dans la region des grands lacs africains* (Geneva: United Nations High Commission for Refugees, 1992), 13–14, www.metafro.be/grandslacs/grandslacsdir200/0623.pdf; see also Philip Verwimp, "Agricultural Policy, Crop Failure and the 'Ruriganiza' Famine (1989) in Southern Rwanda: A Prelude to Genocide?" Center for Economic Studies, Discussion Paper Series (DPS) 2.07 (1992), http://www.econ.kuleuven.be/ces/discussionpapers/default.htm.

87. Guichaoua, *Le problème des refugies rwandais*, 14 (my trans.).

88. For a discussion, see Scherrer, *Genocide and Crisis*, 43–45.

89. A fifth column is any group of people who conspire to undermine a larger group from within.

90. Scherrer, *Genocide and Crisis*, 50.

91. For a discussion of French policy and motives, see Prunier, *The Rwandan Genocide*, 102–103.

92. Mamdani, *When Victims Become Killers*, 186–187.

93. See Tor Sellstom and Lennart Wohgemuth, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience*, Study 1 Historical Perspective: Some Explanatory Factors (Uppsala, SE: The Nordic Africa Institute, 1997), 39, 45 for estimates.

94. Mamdani, *When Victims Become Killers*, 188–189.

95. Hassan Ngeze, the editor-in-chief of *Kangura*, was convicted of genocide and crimes against humanity in 2003 by the International Criminal Tribunal for Rwanda (ICTR) and sentenced to 35 years' imprisonment. See Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation's Question for Redemption* (New York: The Free Press, 2005).

96. Ibid., 2–3.

97. Prunier, *The Rwandan Crisis*, 189.

98. Ibid., 129.

99. Prunier, The *Rwandan Crisis*, 141–142; Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca, NY: Cornell University Press, 2006), 219.

100. Prunier, *The Rwandan Crisis*, 137–139. See also Claudine Vidal, "*Grands tueurs et petits tueurs: la question de l'obéissance dans le génocide des Rwandais Tutsis*," in *Obéir/désobéir*, ed. André Loez and Nicolas Mariot (Paris: La Découverte, 2008), 110–112.

101. Des Forges, *Leave None to Tell*, 839.

102. Prunier, *The Rwandan Crisis*, 250.

103. Ibid., 231–232.

104. Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed, 2000), 64–65.

105. Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide*, rev. ed. (London: Verso, 2006), 57–58.

106. Mamdani, *When Victims Become Killers*, 154–155.

107. Prunier, *The Rwandan Crisis*, 168; Melvern, *Conspiracy to Murder*, 29.

108. Jean-François Dupaquier, *Politiques, militaires et mercenaires rrançais au Rwanda. Chronique d'une désinformation* (Paris: Karthala, 2014), 206–207.

109. General Roméo Dallaire, who commanded the United Nations peacekeeping force, saw Ndindiliyimana as one of the good guys in the drama. See Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Cambridge, MA: DaCapo, 2003), 202, 222–225, 381–382.

110. Prunier, *The Rwandan Crisis*, 179. For a discussion of the French role, see Dupaquier, *Politiques, militaires et mercenaires français au Rwanda*, 61ff, ch. 14, 311–330, in Dupaquier is titled "*Aveuglement ou complicités françaises* [The blindness or complicity of the French]."

111. See Filip Reyntjens, *L'Afrique des grands lacs en crise. Rwanda et Burundi (1988–1994)* (Paris: Karthala, 1994), 125.

112. Bruce D. Jones, "The Arusha Peace Process," in *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, ed. Howard Adelman and Astri Suhrke (New Brunswick, NJ: Transaction Publishers, 2000), 138–140.

113. Ibid., 146–149. See also Linda Melvern, *Conspiracy to Murder*, 121–123.

114. For information, http://www.un.org/en/peacekeeping/missions/past/unamir.htm.

115. Dallaire, *Shake Hands with the Devil.*

116. Malvern, *Conspiracy to Murder*, 99.

117. Malvern, *A People Betrayed*, 84–85.

118. See Prunier, *The Rwandan Crisis*, 230; Des Forges, *Leave None to Tell*, 269–271 for a list of important officials.

119. Des Forges, *Leave None to Tell*, 260–261; see also Filip Reyntjens, *Rwanda, trois jours qui ont fait basculer l'histoire* [Three days that made history tilt] (Paris: L'Harmattan, 1996), 53–58.

120. Des Forges, *Leave None to Tell*, 275.

121. Ibid., 276–277.

122. For the politics within the United Nations, see Melvern, *A People Betrayed*, 176–181.

123. Reyntjens, *Rwanda trois jours*, 134–136.

124. Malvern, *Conspiracy to Murder*, 206.

125. Prunier, *The Rwandan Crisis*, 261.

126. Dallaire, *Shake Hands with the Devil*, 325.

127. S/RES/929 (1994), June 22, 1994, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/260/27/PDF/N9426027.pdf?OpenElement.

128. Melvern, *Conspiracy to Murder*, 250.

129. Des Forges, *Leave None to Tell*, 1041, 1043.

130. Ibid., 1045.

131. Prunier, *Africa's World War*, 5.

132. For a comprehensive treatment of the evolution of governance after the genocide, see Filip Reyntjens, *Political Governance in Post-Genocide Rwanda* (Cambridge, UK: Cambridge University Press, 2013).

133. Des Forges, *Leave None to Tell*, 1052, 1064.

134. Reyntjens, *Political Governance*, 8.

135. Prunier, *Africa's World War*, 3.

136. The number of clerics indicted in various judicial fora for explicit acts serves as a grim reminder that Christian charity played virtually no role. The title of the first chapter in Timothy Longman's book captures a grim reality: "People Came to Mass Each Day to Pray; Then They Went Out to Kill." See Timothy Longman, *Christianity and Genocide in Rwanda* (Cambridge, UK: Cambridge University Press, 2011), chs. 1, 10; Christian Terras, ed., *Rwanda: L'honneur perdu du eglise* (Villeurbanne, FR: Editions Golias, 1999).

137. International Criminal Tribunal for Rwanda, http://www.unictr.org/.

138. William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, UK: Cambridge University Press, 2006), 377–382. For a discussion of the political issues surrounding detention, see Prunier, *Africa's World War*, 10–11, http://www.unictr.org/Cases/tabid/204/Default.aspx.

139. Prunier, *Africa's World War*, 35.

140. "Burundi at Crossroads: Tensions Are Rising Ahead of the 2015 Elections," *Insight on Conflict* (October 23, 2013), http://www.insightonconflict.org/2013/10/burundi-at-crossroads/.

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CHAPTER 8

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2. Human Rights Watch, "Sudan: ICC Warrant for Al-Bashir on Genocide" (July 13, 2010), http://www.hrw.org/news/2010/07/13/sudan-icc-warrant-al-bashir-genocide.

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7. R. J. Rummel, "Death by Government: Stalin Beat Hitler but Mao Surpassed Both," OrthodoxyToday.org, http://www.orthodoxytoday.org/articles5/RummelDemocide.php.

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9. Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven, CT: Yale University Press, 2007), 513..

10. Stephen Uhalley Jr., *A History of the Chinese Communist Party* (Palo Alto, CA: Stanford University Press, 1988), 18.

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16. For an account, see Harrison E. Salisbury, *The Long March: The Untold Story* (New York: McGraw-Hill, 1987).

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22. Valentino, *Final Solutions*, 122.

23. Kenneth Lieberthal, "The Great Leap Forward and the Split in the Yan'an Leadership, 1958–65," in *The Politics of China 1949–1989*, ed. Roderick MacFarquhar (Cambridge, UK: Cambridge University Press 1993), 91.

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46. Kiernan, *Blood and Soil*, 540, citing historian Eric Jennings.

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48. Ben Kiernan, “The Cambodian Genocide, 1975–1979,” in *Century of* Genocide, ed. Samuel Totten and William L. Parsons (New York & London: Routledge, 2009), 342.

49. Ben Kiernan, *How Pol Pot Came to Power: A History of Communism in Kampuchea, 1930–1975*, 2nd ed. (New Haven, CT: Yale University Press, 2004), 123.

50. For a good history of Sihnouk’s long career, see Milton E. Osborne, *Sihanouk: Prince of Light, Prince of Darkness* (Honolulu: University of Hawaii Press, 1994). Sihanouk shared a general Cambodian dislike for the Vietnamese as “traditional enemies and destroyers of the Cambodian state,” Osborne, *Sihanouk*, 151.

51. Kiernan, *How Pol Pot Came to Power*, 158, 219.

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54. David P. Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution Since 1945* (New Haven, CT: Yale University Press, 1991), 159.

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63. Kenneth M. Quinn, “Pattern and Scope of Violence,” in *Cambodia, 1975–1979*, ed. Jackson, 193.

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68. Valentine, *Final Solutions*, 133.

69. Weitz, *Genocide*, 160.

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75. Kiernan, “The Cambodian Genocide,” 347.

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80. Kiernan, *The Pol Pot Regime*, 336.

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100. Naimark, *Fires of Hatred*, 145–146.

101. Ibid., 147.

102. Kiernan, *Blood and Soil*, 591.

103. For Croatia, see Marcus Tanner, *Croatia: A Nation Forged in War* (New Haven, CT: Yale University Press, 1997), 221ff; and Mile Bjelajac and Ozren Žunec, "The War in Croatia, 1991–1995," in *Confronting the Yugoslav Controversies: A Scholars' Initiative*, 2nd ed., ed. Charles Ingrao and Thomas A. Emmert (West Lafayette, IN: Purdue University Press, 2012), 233–272.

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109. In April 2011, the Trial Panel of the ICTY found Gotovina guilty on eight of the nine counts of his indictment. On November 16, 2012, the Appeals Panel reversed all of the convictions and immediately set him free. *Appeals Judgement Summary for Ante Gotovina and Mladen Markač*, November 16, 2012 [IT-06–90-A], http://www.icty.org/case/gotovina/4#acjug.

110. ICTY, Indictment: *The Prosecutor of the Tribunal against Ante Gotovina,* http://www.icty.org/x/cases/gotovina/ind/en/got-ii010608e.htm.

111. Calic, "Ethnic Cleansing," 121.

112. Ibid., 122.

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114. Ibid.

115. See the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), §133.

116. Calic, "Ethnic Cleansing," 125–126.

117. Nina Berman, "Victims of Mass Rape in the Bosnian Genocide, Photos and Testimonies," May 17, 2012, http://bosniangenocide.wordpress.com/2012/05/17/victims-of-mass-rape-in-the-bosnian-genocide-photos-and-testimonies/.

118. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution *780 (1992),* §129, para 56.

119. Naimark, *Fires of Hatred*, 163–165.

120. *Prosecutor v. Radislav Krstić*, Judgment of August 2, 2001 [IT-98–33-T], http://www.icty.org/case/krstic/4#acjug.

121. Bill Clinton, "The Dayton Accords," *Encyclopedia Britannica Online,* http://www.britannica.com/EBchecked/topic/153203/Dayton-Accords.

122. Martin Mennecke, "Genocidal Violence in the Former Yugoslavia: Bosnia-Herzegovina and Kosovo," in *Century of* Genocide, ed. Totten and Parsons, 531.

123. James Gow, "War in Kosovo, 1998–1999," in *Confronting the Yugoslav Controversies: A Scholars' Initiative*, 2nd ed., ed. Charles Ingrao and Thomas A. Emmert (West Lafayette, IN: Purdue University Press), 314.

124. Mennecke, "Genocidal Violence," 532.

125. Quoted in Gow, "War in Kosovo," 314.

126. For a summary of the issues, see Adam Roberts, "NATO's 'Humanitarian War,' over Kosovo," *Survival* 41, no. 3 (1999), 102–123. For an extensive discussion of these issues, see volume 2 of this set.

127. Gow, "War in Kosovo," 315.

128. UNCHR, "Serbia" (2014), http://www.unhcr.org/pages/49e48d9f6.html.

129. "Kosovo Clashes 'Ethnic Cleansing,'" BBC News (March 20, 2004), http://news.bbc.co.uk/2/hi/europe/3551571.stm; "Kosovo Profile," BBC News (July 17, 2014), http://www.bbc.com/news/world-europe-18328859.

130. See UNMIK: United Nations Interim Administration, Mission in Kosovo, http://www.un.org/en/peacekeeping/missions/unmik/.

131. For an account of the Milošević trial, see Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge, UK: Cambridge University Press, 2007). For a discussion of the ICTY, see chapter 10.

132. "Former Kosovo Rebel Leader Fatmir Limaj Faces Retrial," BBC (November 20, 2012), http://www.bbc.com/news/world-europe-20418824.

CHAPTER 9

1. Quoted in Adam Gearey, Wayne Morrison, and Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions,* 2nd ed. (New York: Routledge, 2013), 109. The quote is often attributed to Winston Churchill.

2. For a concise treatment of the issues here, see Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (Princeton, NJ: Princeton University Press, 2000), Chapter 1 Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 3rd ed. (New York: The New Press, 2006), 244–250, 401–406.

3. ICTJ (International Center for Transitional Justice), "What Is Transitional Justice?" http://ictj.org/about/transitional-justice.

4. See *Making Justice Work*, Report of the Century Foundation/Twentieth Century Fund Task Force on Apprehending Indicted War Criminals (1998), 27–29. See also Bass, *Stay the Hand of Vengeance*, 1, 28–33. Bass argues that liberal states "commonly see their enemies not as mere foes, but as war criminals deserving punishment." Bass, *Stay the Hand of Vengeance*, 35.

5. International Crisis Group, "New ICC Prosecution: Opportunities and Risks for Peace in Sudan," http://www.crisisgroup.org/home/index.cfm?id=5571&l=1&m=1.

6. Owen Bowcott, "ICC Drops Murder and Rape Charges against Kenyan President," *The Guardian* (December 5, 2014), http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta.

7. See Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) for an excellent treatment of the issues here.

8. See Truth and Reconciliation Commission, http://www.doj.gov.za/trc/; for the report, see http://www.info.gov.za/otherdocs/2003/trc/.

9. Quoted in Josefine Volqvartz, "ICC Under Fire Over Uganda Probe." CNN.com (February 23, 2005), http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/.

10. Memorandum of Reservations Presented by the Representative of the United States to the Report of the Commission on Responsibilities, *American Journal of International Law* 14 (1920): 144ff. Traditional international law holds states (as collectives) responsible for delicts, not individuals. See James Larry, *International Crime and Punishment: A Guide to the Issues* (Santa Barbara, CA: ABC-CLIO, 2009), 9–12.

11. Bass, *Stay the Hand of Vengeance*, 122–123.

12. Ibid., 126.

13. Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Little, Brown, 1992), 61.

14. In total, 142 of the 185 defendants were found guilty of at least one of the charges. Twenty-four persons received death sentences. Eleven of these were subsequently reduced to life sentences. Twenty were sentenced to life imprisonment, 98 were handed down sentences of varying lengths, and 35 were acquitted. Four defendants had to be removed from trials due to illness, and four more committed suicide during the trials.

15. The 1961 film *Judgment at Nuremberg*, starring Burt Lancaster and Spencer Tracy, dealt with the Judges' Trial, http://www.imdb.com/title/tt0055031/.

16. *The Belsen Trial* (Trial of Josef Kramer and 44 Others), Case No. 10, British Military Court, Luneburg, September 17–November 17, 1945. For a concise summary of the proceeding, see http://www.ess.uwe.ac.uk/WCC/belsen1.htm.

17. For the relevant primary documents here, see The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm.

18. In 1940, Stalin ordered the execution of somewhere between 21,000 and 25,000 Polish POWs. Although it did not have the most deaths, the most noted in the West was the Katyn Forest massacre. For a brief discussion, see http://www.cnn.com/SPECIALS/cold.war/episodes/01/spotlight/index.html.

19. Text in *American Journal of International Law* 39, 257 (1945 Supp.); Consult *International Conference on Military Trials, London, 1945* (Department of State Publication 3080), for the texts of all proposals at the meeting. The principles contained in the 1945 Agreement were recognized as binding in international law by UN General Assembly Resolution 95 (I) (December 11, 1946).

20. Taylor, *The Anatomy of Nuremberg*, 61–64.

21. Several other issues arose as well. The United States insisted on including a charge of conspiracy. This would permit prosecutors to prosecute organizations (i.e., the Nazi Party, the Gestapo) for *conspiracy* to commit various war crimes and atrocities. A guilty verdict would brand the group as criminal; then any member of these organizations could be convicted by merely proving membership in the group because they were part of a larger criminal enterprise. Unfortunately, while a favorite of U.S. prosecutors, the idea has no foundation in continental law. The other three powers finally agreed but limited its application to the single charge of initiating aggressive war.

22. Text of judgment and the sentences reprinted in *American Journal of International Law* 41 (1947): 172–332. See also Taylor, *The Anatomy of Nuremberg*; Georg Schwarzenberger, "The Judgment of Nuremberg," *Tulane Law Review* 21 (1947): 329; Quincy Wright, "The Law of the Nuremberg Trial," *American Journal of International Law* 41 (1947): 37.

23. The Allies refused to believe reports of Bormann's death. The more curious question is why they did not indict Heinrich Müller, the head of the Gestapo, in absentia, or for that matter Adolf Eichmann, Müller's subordinate but directly responsible for running the death camps.

24. Robertson argues that "the only serious departures from Anglo-American trial procedures were standard features of Continental systems." *Crimes against Humanity*, 250.

25. You will see this referred to as "equality of arms."

26. Attractive as this argument might sound in theory, it ignores the fact that it runs counter to the administration of law in every country. If it were true, then no spy could be given a legal trial, because his case is always heard by judges representing the enemy country. Yet no one has ever argued that in such cases it was necessary to call on neutral judges. The prisoner has the right to demand that his judges shall be fair but not that they shall be neutral. As Lord Writ has pointed out, the same principle is applicable to ordinary criminal law because "a burglar cannot complain that he is being tried by a jury of honest citizens." Arthur Lehman Goodhart, "The Legality of the Nuremberg Trials," *Juridical Review* (1946) reprinted in Guénaël Mettraux, ed., *Perspectives on the Nuremberg Trial* (Oxford, UK: Oxford University Press, 2008), 29.

27. Robertson, *Crimes against Humanity*, 252.

28. For a critical assessment midway through the process, see Daryl A. Mundis. "The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals," *AJIL* 99, no. 1 (2005): 142–158.

29. "Case Information Sheet, Goran Hadžić," ICTY [IT-04-75], http://www.icty.org/x/cases/hadzic/cis/en/cis_hadzic_en.pdf.

30. "About the MICT, United Nations Mechanism for International Criminal Tribunals," http://www.unmict.org/en/about.

31. *Prosecutor v. Augustin Ngirabatware*, Trial Judgement, ICTR, (December 20, 2012) [ICTR-99-54], http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-99-54/trial-judgements/en/121220.pdf; Appeals Judgement, MICT (December 18, 2014) [MICT 12-29], http://www.unmict.org/sites/default/files/case documents/mict-12-29/appeals-chamber-judgements/en/141218.pdf.

32. *Prosecutor v. Pauline Nyiramasuhuko et al.,* Trial Judgement, ICTR (June 24, 2011) [ICTR-98-42-T]; Appeals Judgement (December 14, 2014) [ICTR-98-42-A], http://m.unictr.org/sites/unictr.org/files/case-documents/ictr-98-42/appeals-chamber-judgements/en/151214.pdf; for a summary of the trial and appeal see, "Appeals Chamber Delivers Judgement in the Nyiramasuhuko et al Case," United Nations Mechanism for International Criminal Tribunals (December 14 2015), http://unictr.unmict.org/en/news/appeals-chamber-delivers-judgement-nyiramasuhuko-et-al-case.

33. "The ICTR in Brief," United Nations Mechanism for International Criminal Tribunals, http://unictr.unmict.org/en/tribunal.

34. *Prosecutor v. Naser Orić* [IT-03-68-T] Judgement of June 30, 2006 (Trial Chamber II).

35. "Aiding and abetting" is often regarded as less serious because the charge infers "secondary" participation because it does not require direct commission of prohibited acts. Accordingly, the requirements to establish "aiding and abetting" are somewhat less stringent. Establishing guilt does require the prosecution to show that the acts or omissions (failure to perform a duty such as policing) contributed substantially to the crime. *Prosecutor v. Blaskić*, ICTY, Appeals Chamber, July 29, 2004 [Case No. IT-95-14-A], 47, 48; for the problems associated with connecting those who order or facilitate but do not actually participate in the resulting acts, see James Larry Taulbee, "Customary Law and the Ad Hoc International Criminal Courts," in *Trials and Tribulations of International Prosecution*, ed. Henry F. Carey and Stacey Gibson Mitchell (Lanham, MD: Lexington Books, 2013), 17–32.

36. ICTY Statute, http://www.icty.org/sections/LegalLibrary/Statuteofthe Tribunal; ICTR Statute, http://www.unictr.org/Portals/0/English%5CLegal%5C Statute%5C2010.pdf; SCSL Statute, http://www.rscsl.org/Documents/scsl-statute.pdf.

37. UN SCOR, S/RES/953 (1994), Preamble, para. 3.

38. William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, UK: Cambridge University Press, 2006), 162.

39. ICTY Statute, Article 7.

40. ICC, *Elements of Crimes*, Section 6 (emphasis added).

41. BBC News, "Charges Facing Saddam Hussein," July 1, 2004, http://news.bbc.co.uk/1/hi/world/middle_east/3320293.stm.

42. See for example, *Prosecutor v. Jelesić*, Judgement 48; *Prosecutor v. Kayishema and Ruzindana*, Judgment 94.

43. *Prosecutor v. Krstić*, ICTY, Appeals Chamber, Judgement of April 19, 2004 [IT-98-33-A], 134, 140.

44. Schabas, *The UN International Criminal Tribunals*, 169.

45. *Prosecutor v. Krstić*, ICTY, Trial Chamber I, Judgement of August 2, 2001 [IT-98-33-T], 590.

46. *Prosecutor v. Duško Tadić*, Trial Chamber Judgement, July 14, 1997 [IT-94-1-T].

47. *Prosecutor v. Goran Jelisić*, Trial Chamber Judgement, December 14, 1999, [IT-95-10-T].

48. For a lengthy examination of the politics and time line involved in establishing the tribunals, see Schabas, *The UN International Criminal Tribunals*, 3–46; and Daphna Shraga and Ralph Zacklin, "The International Criminal Court for the Former Yugoslavia," *European Journal of International Law* 5, no. 1 (1994): 1–22.

49. UN SCOR, S/RES/953 (1994), Preamble, para. 3. See also Daphna Shraga and Ralph Zacklin, "The International Criminal Court for Rwanda," *European Journal of International Law* 7, no. 4 (1996): 501–518.

50. See chapter 6 for a full discussion.

51. See Article 2, Statute of the Special Court for Sierra Leone; and Schabas, *The UN International Criminal Tribunals*, 162.

52. Erik Mose, president of the ICTR (2003–2007), noted in an address to the UN General Assembly (November 15, 2004), "It is a paradox that indispensable financial contributions are not paid when the tribunal is doing its utmost to complete its task. We cannot maintain the speed if the brakes are on. A slowing down of the judicial process may also mean that Member states have to pay their contributions for longer periods of time. As stated in our Annual Report, the Tribunal strongly recommends that it continues to receive sufficient resources to enable it to comply with the deadlines set by the Security Council." http://69.94.11.53/ENGLISH/speeches/mose151104.htm.

53. See Martin Mennecke, "Genocidal Violence in the Former Yugoslavia: Bosnia Herzegovina and Kosovo," in *Century of* Genocide, 3rd ed., ed. Samuel Totten and William L. Parsons (New York & London: Routledge, 2009), 507–552.

54. M. Cherif Bassiouni, "Combating Impunity for International Crimes," *Colorado Law Review* 71, no. 2 (2000): 417–418.

55. Ibid., 417.

56. This stands as an interesting anomaly, given the reluctance of both the Bush and Clinton administrations to use the "g" word. See Samantha Power, "Bystanders to Genocide," The Atlantic.com, http://www.theatlantic.com/doc/200109/power–genocide/2; and Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), ch. 9.

57. Quoted in Schabas, *UN Tribunals*, 18.

58. Michael Scharf noted: "From the beginning, the Security Council's motives in creating the tribunal were questionable. During the negotiations to establish the court . . . it became clear that several of the Security Council's permanent members considered the tribunal a potential impediment to a negotiated peace settlement." Michael Scharf, "Indicted for War Crimes. Then What?" *Washington Post* (October 3, 1999): B01. Note that both China and Russia had reason to be wary—China because of Tiananmen Square and Russia because of Chechnya.

59. Article 41, Charter of the United Nations, http://www.un.org/en/charter-united-nations/ (emphasis added).

60. *Effects of Awards of Compensation Made by the United Nations Administrative Tribunals*, ICJ Reports (1954).

61. United Nations: Secretary-General's Report on Aspects of Establishing an IT, 32 *ILM* 1163, 1192 (1993); International Tribunal, "Rules of Procedure and

Evidence," 33 *ILM* 484 (1994); see also James C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *American Journal of International Law* 87, no. 4 (1993): 639–658; Diane F. Orentlicher, "Yugoslavia War Crimes Tribunal," *American Society of International Law Newsletter* (June–August 1993), *ASIL Focus* No. 1.

62. Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law," *American Journal of International Law* 88, no. 1 (1994): 78–88. At this time, Meron, who would later serve as president of the court, wrote, "Despite its desirability, it is probable that the tribunal will not be very effective." Theodor Meron, "The Case for War Crimes Trials in Yugoslavia," *Foreign Affairs* 72, no. 3 (1993), 122.

63. Bass, *Stay the Hand of Vengeance*, 224. See also Gérard Prunier, *The Rwanda Crisis* (New York: Columbia University Press, 1997).

64. About the ICTY, http://www.icty.org/sections/AbouttheICTY.

65. On April 7, 2006, the Appeals Chamber upheld the decision to refer the *Mejakić et al.* case, involving four accused, to Bosnia and Herzegovina for trial. The Appeals Chamber dismissed eight of the grounds in the Joint Defense Appeal and allowed one in part, http://www.un.org/icty/latest–e/index.htm.

66. ICTY at a Glance.

67. William A. Schabas, "The *Jelisić* Case and the *Mens Rea* of the Crime of Genocide," *Leiden Journal of International Law* 14 (2001): 127.

68. *Prosecutor v. Radislav Krstić*, Judgment of April 19, 2004, Case No.: IT-98-33-A, §144 http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf.

69. UN SCOR, S/RES/912 (April 21, 1994).

70. UN SCOR, S/RES/955 (November 8, 1994). Text of the statute at http://www.un.org/ictr/statute.html. The original text was appended to the resolution.

71. Shraga and Zacklin, "The International Criminal Court for Rwanda," 504; Schabas, "UN Tribunals," 29.

72. Shraga and Zacklin, "The International Criminal Court for Rwanda," 504.

73. See Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* (Bloomington: Indiana University Press, 2005) for an excellent short account of events.

74. About the Special Court, http://www.sc–sl.org/about.html.

75. Schabas, *The UN International Criminal Tribunals*, 162.

76. Residual Special Court for Sierra Leone, http://www.rscsl.org/; see also, "Exploring the Legacy of the Special Court for Sierra Leone," Timeline, http://scsl-legacy.ictj.org/timeline-scsl.

77. "Exploring the Legacy of the Special Court for Sierra Leone."

78. Marlise Simons and Alan Cowell, "50-Year Sentence Upheld for Ex-President of Liberia," *The New York Times* (September 27, 2013), A3, http://www.nytimes.com/2013/09/27/world/africa/charles-taylor-sierra-leone-war-crimes-case.html.

79. Ibid.

80. For a comprehensive treatment of the negotiations that set up the ECCC, see David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia," in *International Criminal Law*, vol. III, 3rd ed., ed. M. Cherif Bassiouni (The Hague: Martinus Nijhoff Publishers, 2008), 219–255, http://www.unakrt-online.org/02_court.htm.

81. United Nations General Assembly, A/RES/52/135.

82. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on October 27, 2004 (NS/RKM/1004/006), http://www.cambodiatribunal.org/wp–content/uploads/2013/08/history_ECCCLaw-Procedure_Law-Establishment-Extraordinary-Chambers.pdf.

83. Scheffer, "The Extraordinary Chambers," 229.

84. See John D. Ciorciari and Anne Heindel, *Law, Meaning, and Violence: Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor: University of Michigan Press, 2014) for a comprehensive treatment.

85. Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia" (March 2013), http://www.opensocietyfoundations.org/sites/default/files/eccc-report-20130322_0.pdf.

86. Seth Mydans, "Ieng Sary, Former Official of Khmer Rouge, Dies at 87," *New York Times* (March 4, 2013), http://www.nytimes.com/2013/03/15/world/asia/ieng-sary-khmer-rouge-leader-tied-to-genocide-dies-at-87.html?_r=0.

87. Open Society Justice Initiative, "Recent Developments," 16–17.

88. Ciorciari and Heindel, *Law, Meaning, and Violence*, 104–132.

89. Thomas Fuller and Julia Thomas, "2 Khmer Rouge Leaders Are Convicted in Cambodia," *The New York Times* (August 8, 2014): A3.

90. "Justifying Justice: Verdicts at the ECCC," quoting Dr. Kirstin Ainley of the London School of Economics, http://justiceinconflict.org/2014/09/16/justifying-justice-verdicts-at-the-eccc/.

91. "Nuon Chea and Khieu Samphan Sentenced to Life Imprisonment for Crimes against Humanity," ECC.gov (August 7, 2014), https://www.eccc.gov.kh/en/articles/nuon-chea-and-khieu-samphan-sentenced-life-imprisonment-crimes-against-humanity.

92. For a concise history, see James L Taulbee, "A Call to Arms Declined: The United States and the International Criminal Court," *Emory International Law Review* 14 (Spring 2000): 105–156.

93. G.A. Res. 177(II), UN Doc. A/519 (1947).

94. For a discussion of the original negotiations, see Lawrence J. Leblanc, *The United States and the Genocide Convention* (Durham, NC: Duke University Press, 1991), 151–174. Ironically, the concerns of the U.S.S.R. (e.g., diminution of sovereign prerogatives) expressed during the negotiations mirrored many of the concerns expressed by members of the U.S. Senate during the first, and subsequent, debates over possible ratification.

95. Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277.

96. On the basis of the recommendations of the Special Committee, the General Assembly finally adopted the Definition of Aggression by consensus in 1974. G.A. Res. 3314, UN GAOR, 29th Sess., Supp. 31, UN Doc. A/9631 (1974).

97. G.A. Res. 897(IX), UN GAOR, 9th Sess., Supp. No. 21, UN Doc A/2890 (1954).

98. UN GAOR, 36th Sess., UN Doc. A/Res/36/106 (1981).

99. Report of the International Law Commission on the Work of Its Forty–Eighth Session, UN GAOR, 51st Sess., Supp. No. 10, at 14, UN Doc. A/51/10 (1996).

100. UN GAOR, 47th Sess., UN Doc. A/Res/50/46 (1992).

101. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 The vote was 120–7 with 21 abstentions. http://www.icc–cpi.int/home.html.

102. Article 4 of the statute states: "The Court shall have international legal personality."

103. See Rome Statute, http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rome%20statute.aspx.

104. Article 5(2) has a caveat, "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." Considering the history of international efforts to define aggression, the provisions for amending the statute (seven-eighths of the Assembly of States Parties) raise serious doubts about future incorporation of this crime into the court's mandate.

105. Rome Statute, Article 17.1(a), (emphasis added).

106. Seven are from the Western European (and others) Group, four from the Latin American Caribbean Group, two from the Asian Group, three from the African Group, and two from the Group of Eastern Europe. Seven are female and 11 are male judges.

107. Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga, and Mathieu Ngudjolo Chui.

108. Ahmad Harun, Ali Kushayb, Omar al-Bashir, and Abdel Raheem Muhammad Hussein.

109. International Criminal Court, Situations and Cases (August 2016), https://www.icc-cpi.int/pages/situations.aspx#.

110. "The International Criminal Court: Why Africa Still Needs It," *The Economist* (June 30, 2010).

111. Ibid., http://www.economist.com/node/16274301.

112. "ICC Troubled by African Union Threats of Withdrawal," *Pan-African News Wire* (May 27, 2013), http://panafricannews.blogspot.com/2013/05/icc-troubled-by-african-union-threats.html. See also Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *The European Journal of International Law* 21, no. 4 (2011): 941–965.

113. "ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence, BBC News (December 5, 2014), http://www.bbc.com/news/world-africa-30347019; "Ruto and Sang Case," International Criminal Court (April 5, 2016), https://www.icc-cpi.int/kenya/rutosang.

114. See, Uju Okoye, "Ending Africa's Culture of Impunity," *Diplomatic Courier* (June 10, 2016), http://www.diplomaticourier.com/ending-africas-culture-impunity/.

115. The Permanent Court of Arbitration, which is not a court, and permanent only in its longevity as the oldest international dispute resolution body, has a list of arbitrators who meet their standards. This list serves as a source for nominations to the International Court of Justice as well as many other international courts. See About Us, Permanent Count of Arbitration, http://www.pca-cpa.org/showpage.asp?pag_id=1027.

116. For full details, see Pending Cases, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), http://www.icj–cij.org/docket/index.php?p1=3&p2=1&code=cry&case=118&k=73.

117. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (1993); Judgment of July 11, 1996; Application for Revision of the Judgment of July 11, 1996, in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment of February 26, 2007.

118. ICJ Bosnia 2007, 278–297.

119. Application Instituting Proceedings (October 17, 2000), Arrest warrant of April 11, 2000 (Democratic Republic of the Congo v. Belgium).

120. Arrest Warrant of April 11, 2000 (Democratic Republic of the Congo v. Belgium) (Merits), Judgment of February 14, 2002.

121. Discussion of the ad hoc court for East Timor stands somewhat outside the principal focus of this book. For a brief summary, see Global Policy Forum, Ad Hoc Court for East Timor, https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/adhoc-court-for-east-timor.html.

122. See Faiza Patel King and Anne-Marie LaRosa, "The Jurisprudence of the Yugoslavia Tribunal: 1994–1996," *European Journal of International Law* 8, no. 1 (1997): 123–180.

123. See Payam Akhavan, "Justice, Power and the Realities of Interdependence: Lessons from the Milošević and Hussein Trials," *Cornell Journal of International Law* 38 (2005): 973–982. For another assessment, see Julie Kim, *Balkan Cooperation on War Crimes Issues: 2005 Update*, Congressional Research Service #RS22097 (March 28, 2005).

124. "Rwanda Starts Prisoner Releases." BBC News (July 29, 2005), http://news.bbc.co.uk/2/hi/africa/4726969.stm.

125. Report of the secretary-general on the activities of the Office of Internal Oversight Services, *Follow-up investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the International Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia*, UN GAOR, Doc. A//56/836 (26 February 2002). Note the ICTY has had scandals as well. Note the title of the report. See also Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation's Quest for Redemption* (New York: Free Press, 2005), 122–124.

126. "Former Yugoslavia: President of War Crimes Tribunal Says Funding Problems Serious," http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/1116funding.htm.

127. Sylvia de Bertodano, "What Price Defence? Resourcing the Defence at the ICTY," *Journal of International Criminal Justice* 2 (2004): 503–508.

128. Mose, "Main Achievements of the ICTR," 928.

129. For example, "The very idea of an international criminal court may well be a dangerously utopian one to begin with. As various critics of the ICC have pointed out, courts derive whatever democratic legitimacy they may enjoy from being embedded in more comprehensive systems of government in which their

powers are checked by democratically accountable institutions." John Rosenthal, "A Lawless Global Court: How the International Criminal Court Undermines the UN System," *Policy Review* 123 (February–March 2004), http://www.hoover.org/publications/policyreview/3439981.html.

130. See for example, Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), and William A. Schabas and Shane Darcy, eds., *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (Dodrecht, NE: Kluwer, 2004) for good discussion of the issues here.

131. For a comprehensive critique by a participant, see Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge, UK: Cambridge University Press, 2007).

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CHAPTER 10

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4. Elizabeth Jelin, "The Minefields of Memory," *NACLA Report on the Americas* 32, no. 2 (1998): 23–24.

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7. J. L. Holzgrefe, "The Humanitarian Intervention Debate," in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J. L. Holzgrefe and Robert O. Keohane (Cambridge, UK: Cambridge University Press, 2003), 17.

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9. This interaction is often expressed as the conflict between logics of appropriateness and logics of consequences. See James G. March and Johan P. Olsen,

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11. For treatment of this theme, see George Liska, *Beyond Kissinger: Ways of Conservative Statecraft* (Baltimore: The Johns Hopkins University Press, 1975).

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14. For good capsule histories of cases of unilateral intervention, see A. Mark Weisburd, *Use of Force: The Practice of States since World War II* (University Park, PA: Penn State University Press, 1997). For UN responses, see James L. Taulbee, "Governing the Use of Force: Does the Charter Matter Anymore?" *Civil Wars* 4, no. 2 (2001): 1–58.

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17. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 3.

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Genocide, Mass Atrocity, and War Crimes in Modern History

Blood and Conscience

Volume 2: War Crimes

JAMES LARRY TAULBEE

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Preface

In late March 2016, the International Criminal Court (ICC) issued an indictment for Ahmad al-Faqi al-Mahdi, a member of Ansar Eddine, an extremist militia operating in Mali that has ties to al Qaeda (AQIM). The Pretrial Chamber of the court found the evidence presented by the prosecutor established reasonable grounds to believe that Mr. al-Faqi was criminally responsible, both individually and jointly with others, for having facilitated, committed, or otherwise contributed to the commission of war crimes. He served as the head of the "Hisbah" (a body set up to uphold public morals and prevent vice) and was also associated with the work of the Islamic Court of Timbuktu. He actively participated in executing decisions that involved acts of deliberate destruction and desecration of 10 historic religious sites.

For many readers, this indictment may raise the question of what acts constitute a war crime. Karl von Clausewitz, in his classic work *On War*, described war as having no limits, which suggests that no rules apply because the word "crime" implies that a legal standard has been violated and that the violator ought to be punished for the transgression. Yet, for most people, because clearly winning forms the most obvious goal in war, the idea that individual conduct during hostilities might constitute a crime runs counter to common sense. A "war crime" would seem to define the ultimate oxymoron. Rules and law conjure up visions of fair play and sportsmanship. However, war is an activity where a famous quote, often mistakenly attributed to Vince Lombardi, applies with special meaning: "Winning isn't everything; it is the only thing."[1] Because losers cannot expect that a successful enemy will treat them in a sportsmanlike manner, no standards of "fair play" should limit tactics and strategy.

However persuasive that conclusion seems, it informs us only that we need to do those things necessary to win, leaving open the question of what ″necessary″ means, other than that one should pursue winning through the best utilization of resources in an effective strategy. On the battlefield, even if one envisions a short, decisive struggle, pragmatic reasons dictate tactics and strategies that do not inflict excess harm on noncombatants or damage to areas and places that have no military value. Victors have to consider the aftermath. Winning the peace may be as important as winning the war. Winning the war in ways that confirm the values states promote internationally validates their message. While that may or may not make a difference to the residents and allies of the defeated state, strategies and tactics that violate that message obviously significantly damage the impact of the official message, not only on the enemy but on third-party observers as well. Modern armed conflicts do not occur in an isolated and insulated context. The contemporary world is wired.

Yet this conclusion also requires caveats. Technology has made targeting more precise, but mistakes still happen. We cannot lose sight either of the human element or of the extent to which Machiavelli's *fortuna* still applies to combat operations in spite of technological advances. The value of any air strike depends on the quality of intelligence, much of which must still be gathered in the old-fashioned way—on the ground. Both cost and fear of public reaction to casualties in wars that seem far away and of little interest have made aerial strikes, often by remotely controlled drones, the preferred tactical choice over ground troops. Yet, the limitations of these strikes as well as ancillary issues concerning targets and "collateral damage" raise hard questions and underline the fact that many operations still require infantry "boots on the ground."

More to the point, the nature of contemporary armed conflicts has called into question many areas of the current law. The underlying premises of the legal regime evolved during the first half of the 20th century. Hence the principles presumed that future conflict would be between and among states. While slight modifications have occurred, those assumptions still hold even though interstate wars have formed a very small minority of situations over the past 50 years. In an era when nonstate actors have become major players, how do we evaluate situations in which troops inculcated in these standards face those who have the attitudes of soldiers in the Thirty Years' War (if you do not believe as we do, then suffer, die, and take your chances with God/Allah) have a license to humiliate and degrade the enemy through rape, murder of noncombatants, and desecration of sacred places as a deliberate tactic? In such conflicts, as in those of "wars of national liberation," the fundamental requirement of respect for noncombatant immunity becomes a daunting requirement because insurgents survive by disguise and surprise.

In sorting through these issues, I must acknowledge the assistance of Professor Gary Solis (George Washington University), a retired member of the Marine Judge Advocate General corps, who made some observations that guided me throughout the book and gave me a vital insight into the "law in action." The "law in action" simply refers to how the law applies to how persons react in real-world situations. He particularly noted that no rule of law mandates that soldiers have signed a suicide pact. This comment does not imply license for any behavior, but it does call attention to the important factor of context that I emphasize throughout this book. The context of a particular action provides the setting that defines what actions constitute a *reasonable response* as opposed to those that constitute a crime.

Over the years, I have been fortunate to know many dedicated officers and those who served in the ranks (often without recognition) in the various branches of the U.S. military as well as those who served with allies and others. I have the greatest respect for those soldiers who have endured anarchy in the Afghanistan and Iraq operations and the deepest sympathy for the families and loved ones of those who suffered injury or gave their lives in the line of duty. The book is dedicated to them.

I owe a great debt to the Emory University library staff, who deserve a commendation for their invaluable assistance in locating obscure fugitive materials. Steve Catalano, my editor, gave support during some very difficult personal circumstances during the writing. I can truthfully say that without his encouragement and confidence at crucial points, this book would never have been finished. Of course, I remain wholly responsible for any errors of fact and my conclusions.

JLT
April 2016

CHAPTER 1

War Crimes and the Nature of War

> It is forbidden to kill; therefore all murderers are punished unless they kill in large numbers and to the sound of trumpets.
>
> —Voltaire[1]

SOME PRELIMINARY NOTES: WHY RULES?

To assert that a crime has occurred implies that *someone* has committed an act that violates a standard of conduct formally enacted by authorities considered legitimate and to whom the individuals affected have some organic connection. An accusation that an individual or individuals have committed a war crime thus presumes the actions violated some basic normative principle embodied in a code that governs conduct that participants in a conflict are required to observe. When one factors in the formal requirements of the international legal process, one must navigate an interesting maze over very unfamiliar territory to understand what constitutes a war crime.

Everyone intuitively understands that nothing akin to war exists as part of a well-ordered domestic society. War involves acts considered intolerable in everyday life in that its principal methods require the deliberate wounding and killing of people and intentional infliction of damage on property. The idea that war should be conducted within rules that limit the nature of the conflict runs counter to first instincts. Should not all be fair in love and war?[2] After all, at least in war, winning is everything. Losing has little to recommend it as an option. The idea that combatants should have to conform to a set of guidelines when their lives may depend on the weapons and tactics selected certainly seems exceptionally naive at best. Instincts tell us that the only rule ought to be "anything goes." Indeed, Karl von Clausewitz, in his classic work *On War*, described war as having no limits. The inherent logic of war, the press for victory, dictates the utmost exertion of force: the "ruthless user of force who shrinks from no amount of bloodshed must gain an advantage if his opponent does not do the same."[3] Twenty-five hundred years ago, Thucydides stressed that a constant conflict existed between ideal standards of behavior in war and the human inclination toward passion, expediency, and short-term interest. Suggesting the equivalent of a set of Marques of Queensbury rules for wars—conflicts that clearly have no referee or clear penalties for violation—would seem to mark the writer or speaker as not in complete touch with reality.

The first recorded battles occur in 2700 BC between Sumer and Elam. The earliest pictographs of armies at war, from the kingdom of Kish, date to 3500 BC Jericho, which along with Uruk (Akkadia, along the Euphrates in Iraq), has a claim to the title of the world's oldest city. Archaeologists have unearthed evidence that a very substantial fortified city stood on the site before 7000 BC.[4] History yields many examples of communities that paid the ultimate price of losing. The Old Testament of the Bible records stories of total destruction where, in claiming the territory Jehovah had identified as theirs, the Israelites considered Canaanite cities and their populations as holy sacrifices to Jehovah.[5] Rome felt few qualms of guilt or remorse over the final fate of Carthage. Genghis Khan and Tamerlane (Timur) obviously did not feel compelled to observe any formal protocols of engagement. The total destruction of Nineveh (613 BC) seemed a just retribution for the cruel practices of the Assyrians over several centuries. In more contemporary times, during World War II, the practice of open city bombing by both sides caused the deaths of large numbers of civilians. German, Soviet, and Japanese troops engaged in wholesale mistreatment and killing of prisoners of war (POWs). In the American Civil War, POWs on both sides suffered ghastly conditions in the camps.[6]

K. J. Holsti notes that historically one sees little restraint in warfare between polities of different cultures. If rules of engagement existed, they did not apply to infidels, barbarians, or savages:

> The military relations between Christians and Muslims during the era of the crusades were . . . brutal. More recently, the Spanish conquest of the Aztecs and Incas featured unrestrained slaughter of resisters. British colonial forces likened their military campaigns in Africa to a safari, killing all natives indiscriminately. American armed forces, vigilante groups and militias practiced virtual genocide and massive ethnic cleansing of native Indians from the seventeenth century into the late nineteenth century.[7]

Martin van Creveld makes the same point when discussing attitudes toward certain weapons and tactics, such as the bow, the sword, and the respectability of using ambushes and traps. He concludes: "When war involved a struggle between civilizations whose patterns of thought differed . . . , the results were often markedly savage. Unable to agree as to what constituted acceptable behavior and what did not, each side took the enemy's actions as a pretext for reprisals."[8] American anger at the use of *panji* traps by the Viet Cong gives us a prime example, although laying land mines would seem to embody the same logic.[9] Creveld briefly summarizes the impact of the clash of cultural values in World War II:

> Waged as it was against the background of racism that had taken decades, if not centuries to form, the war against the Western powers was also marked by intense hatred. Allied prisoners who had surrendered to the Japanese were considered by their captors to have forfeited their honor and were often deliberately humiliated, maltreated, starved, and worked to death.[10]

Many insurgent forces today seemingly have little or no conception of, or regard for, rules or restraint in conducting their operations and activities. Such an engagement clearly poses a related question. Even if one side has rules, when faced with enemies who clearly do not share common beliefs about regulations governing conflict, if Clausewitz is correct, why should one play by the rules when the other side does not? Why should one play by the rules if doing so would preclude actions that might provide an advantage or offset a disadvantage?[11]

These issues have particular salience because as technology and the capacity for organization, command, and control have advanced, the ways policy makers and military leaders reason and calculate has not. In contemplating the risks of nuclear war 50 years ago, Raymond Aron observed that nuclear war would be worse "not because men are worse, but because they know more."[12] Yet, claims that advances in technology and the fact that "men" know more have not necessarily translated into better behavior with regard to decisions to initiate war. Based on assumptions generated by German successes against Austria (1866) and France (1870–1871), the Hague Conferences (1899, 1907) proceeded from the widely held belief that technological developments in the late 19th century would make war more humane. Many disagreed, among them Hiram Maxim, the inventor of the modern automatic machine gun (1884). Maxim believed that his invention, along with other developments that had greatly increased the capacity to kill on the battlefield, would inhibit decisions to go to war. Still, the onset of World War I was greeted with enthusiasm and promises that troops would be home by Christmas.[13] The ensuing carnage associated with both World War I and World War II gave credence to the observation by Clausewitz that the inherent logic of war precluded limits, not to the rather rosy expectations that technological advancements would render war less bloody. One should recall Einstein's famous quote in 1946: "The unleashed power of the atom has changed everything save our modes of thinking and we thus drift toward unparalleled catastrophe."[14] To play on Aron's comment, considering the events that marked the end of World War II, the frightening conclusion at the dawn of the Nuclear Age was that men might be worse because they did know more, and the logic of war still prevailed.

Rules and War

If rules for warfare do exist, they must be radically different in purpose from those that govern individual interactions within a state. Seemingly such rules would turn the moral universe on its head. A war crime would seem to define the ultimate oxymoron. Put in simple terms, rules that purport to govern armed conflict would authorize killing as ordinary while specifying exceptions to the right to kill. In stark contrast, rules in domestic law prohibit killing while specifying limited exceptions geared to extraordinary circumstances. Domestically, those who kill over and over again are anathematized as serial killers. In contrast, in war, killing frequently and repeatedly makes individuals excellent soldiers and heroes—medal of honor winners. *Rules of war essentially define protocols for acts of atrocity.* A war crime occurs when a party subject to the rules violates those protocols. Hence, given the peculiar moral calculus that applies to war, the Japanese pilots who carried out the raid on Pearl Harbor did not bear individual liability for their actions once returned to their ship nor did their commanders who issued the order. The pilots and their commanders had become official agents of the state, combatants who now had the right to kill or be killed but were not subject to any action to arrest and try them for murder or other crimes unless they violated some precept of the "laws of war." On the other hand, the Japanese soldiers who organized the Bataan Death March violated what arguably had become customary law concerning the treatment of POWs.

Nonetheless, to be comprehensible and relevant, the content of rules governing war cannot depart from shared moral understandings among those who must interpret and apply the rules. Hence, rules that may have relevance for a particular set of circumstances never exist in a vacuum. To return to points made earlier in the discussion, differences in cultural attitudes can give rise to very different perspectives on what is permissible. If rules governing conflict do exist, they flow from conceptions of the nature of war and its role in a particular set of social relations. Perhaps as an expression of their own racism, the Japanese did not regard the treatment of the Bataan POWs as constituting criminal behavior. Japanese culture at that time reflected the view that any warrior who surrendered had no honor and so was not to be treated as a human being. This attitude would cause much bloodshed on both sides because Japanese soldiers fought literally to the last man rather than surrender.

Warfare on the eastern front during World War II resulted in mind-numbing numbers of casualties, deaths, and deprivation that included civilians and soldiers. Michael Stephenson writes that "the great killing ground was Russia. It was here that Germany was bled to death."[15] In the war, Germany suffered *13.5 million* casualties across all areas of engagement. Of these, *10.8 million* were killed or captured on the eastern front. Germany observed no protocols in the struggle. In combat, the Red Army lost 6.5 million men. Another estimated 5.7 million were captured, more than half of which died from starvation or deliberate execution.[16] In the fight against Bolshevism, Hitler made no distinction between the rulers and the agents—all shared equal guilt, so all should die if they acted in ways that supported the rulers.

To use another illustration, the contemporary idea that resort to the use of force should be limited to the sole contingency of self-defense against aggression had little resonance prior to efforts to limit war after World War I.[17] Considering that the contemporary legal context presumes an attack carried out by a state, not by a nonstate actor, this raises many questions concerning the scope and type of permissible retaliation.[18] Similarly, Clausewitz's famous definition of war as a tool of realpolitik would have had little or no meaning to European statesmen, historians, or philosophers before the middle of the 15th century because the impetus and motives for war did not flow from the perceived need for state security in that the state in its modern form did not exist. Motives and reasons for going to war had nothing to do with articulation of *raisons d'état* because the state as Clausewitz understood it had yet to evolve from the complex network of personal loyalties and relationships that underpinned inter-"national" interaction in medieval Europe. Simply, if rules do exist, they have evolved from the cultures and experiences of war-making societies, not from abstract derivation from a transcendent moral order, even though religious concerns obviously may play a role.[19]

The discussion thus far has focused on questions relating both to regulating conduct and targets in war, the *ius in bello*, as well as the nature of decisions to *resort to war*, or the *ius ad bellum*.[20] Throughout most of recorded history, war has formed part of the natural order of relationships even in societies revered as being the precursors of many institutions and values greatly valued in the present. True, the Romans did have a concept of just war, but this involved scrupulously observing the appropriate procedures/rites rather than any serious debate over abstract requirements of "justice." Arthur Nussbaum observes: "This proceeding did not handicap the Romans in their wars of conquest, but at least from the viewpoint of 'morale' it was of incomparable value because of the apparent fairness of the ritual trial. It gave people the certitude that the gods would side with them."[21] Although rules might not derive from transcendent law, having heavenly forces in support of one's effort certainly has been considered important to many different societies in many different epochs. Being polytheistic had a downside because in reading the epic Greek accounts, different gods had different favorites. Having a Greek god on your side did not necessarily mean more than hoping that the political and social situation within the Olympic pantheon would permit sufficient assistance at an appropriate time in one's quest.

The resort to force became an item thought worthy of extended analysis only in the fourth century AD. St. Augustine systematically addressed the question: Even though war forms a part of the natural order, how can one Christian ruler justifiably declare war on another?[22] His ensuing analysis forms the roots from which arguments over the *ius ad bellum* (literally, the right to war) has since proceeded in debates about just wars. Augustine's concern would not move from a matter of debate to reality until the United Nations Charter outlawed the unilateral resort to war except in self-defense.[23] Chapter 2 will analyze the just war tradition in more detail.

Historical evidence suggests that apart from limitations that flow from the state of technology and capacity for organization that constrain what each side can do to the other, restraints have derived more from considerations of expediency and utility than from any sense of sympathy for the suffering of victims. Rules that do not have utility tend to fade quickly from relevance. One needs to look no further than the disregard of the rules purporting to govern submarine warfare during World War I. Prize rules, presumably still in effect at the beginning of the war, stated that passenger ships may not be targeted, crews of merchant ships must be placed in safety before their ships may be sunk, and only warships and merchant ships that constitute a direct threat to the attacker may be sunk without warning. Observing them would have rendered the submarine a "sitting duck" rather than the potent stealth weapon it became.

Avid proponents might object here that over the last 175 years, the evolution of rules related to noncombatant immunity, the status of wounded and ill combatants, and prohibitions against torture belie this observation. Advocates will insist that contemporary Western armies have thoroughly indoctrinated their soldiers in the principal norms of international humanitarian law and that the attention given to violations in the media, particularly the concern over injury to civilians, illustrates the impact.[24] However, one must consider the impact of such incidents on future tactics. Given open airings in democratic countries since 9/11, did the airing of the incidents, or repeated airing of similar incidents, materially change the tactics used?

Moreover, even the most avid proponents will have to admit that the provisions of the Geneva Conventions remained largely unenforced until the conflicts in the former Yugoslavia highlighted the abuses.[25] Combined with the observations earlier, the conclusion points out that the effective application/enforcement of humanitarian law depends on the political will of states. The Geneva Conventions contain a never-implemented mechanism for monitoring by states parties not directly involved in a conflict. While the ad hoc UN courts set up in response to events in the Balkans, Rwanda, and other areas, and the entry into force of the Rome Statute for the permanent International Criminal Court mark some progress, the long-term impact of these on state practice still remains a very large question mark. As many have pointed out, the cases have all centered on events in weaker states, not from accusations concerning the actions of the strong. Asserting that something has been done evades the central question posed as much as claiming that aspects of the law that could provide some protection regularly go unheeded and that violators go unpunished.

As noted earlier, pragmatic concerns of cost and effect do come into play. If cost-effective killing defines the key to success, the term "Pyrrhic victory" signifies an outcome where the victorious side has suffered casualties and damage at a level that makes the accomplishment meaningless. One wins but at a ruinous cost. Pyrrhus, king of Epirus, twice defeated the Romans. In both engagements, the Romans lost more men, but the problem stemmed from the comparative manpower base the two had from which they could draw replacements. After the battle of Asculum in 279 BC, Plutarch reports:

> We are told that Pyrrhus said to one who was congratulating him on his victory, "If we are victorious in one more battle with the Romans, we shall be utterly ruined." For he had lost a great part of the forces with which he came, and all his friends and generals except a few; moreover, he had no others whom he could summon from home, and he saw that his allies in Italy were becoming indifferent, while the army of the Romans, as if from a fountain gushing forth indoors, was easily and speedily filled up again, and they did not lose courage in defeat, nay, their wrath gave them all the more vigour and determination for the war.[26]

During the height of Cold War tensions, many involved in debates over the possibility of surviving a nuclear war suggested that the weapons needed to be abolished because any outcome of a nuclear exchange would be a Pyrrhic victory such that the "living would envy the dead."[27] The question for the United States has always been, if a nuclear exchange resulted in circumstances where democratic institutions did not survive under the conditions needed for decisions about allocation of very scarce resources, would the war have been worth fighting? To harken back to the Russell-Hook debate, the rationale would seem to be the infamous logic of "we had to destroy it in order to save it."

While it does not necessarily cover all questions relating to cost-benefit with respect to war-making, analysts often invoke the principle of proportionality as a pragmatic rule of thumb governing both the resort to force and goals articulated as well as the use of particular means or tactics. Note that as used here, the reference stands somewhat outside the use of proportionality principles in both national and international law in that it suggests a broader set of criteria for the proportionality scales. Classical political realists would term this the principle of prudence: do not overreach—be wary of the potential consequences, possibly unintended, of your actions.[28] The difficulty of observing this advice comes from the logic of war itself: if the costs of war mount, in order to match the sacrifice for those engaged, the tendency will be to increase the value of the objective sought. Bruce Catton, writing about the American Civil War, makes a vital observation: "Doing what has to be done to win, men perform acts that alter the very soil in which society's roots are nourished."[29] World War II began with Allied concern about the bombing of civilians and ended with Hamburg, Dresden, Hiroshima, and Nagasaki.[30] Afghanistan and al Qaeda saw the United States sanction interrogation methods that violate fundamental beliefs enshrined in the Constitution. From a slightly different line of argument, it is hard when seeing innocent captives beheaded to resist the quite human impulse to respond in kind, to presume that dealing with barbarism requires adopting barbarous methods. Yet, one must ask the question, in order to deal with criminals, do we have to adopt criminal methods, in essence to become criminals ourselves—to become that which we detest and have vowed to punish?

A second pragmatic factor arises from recognition of relative equality and certainty of recurring clashes between adversaries. Such a relationship can evolve into tacit understandings about the permissibility of means and targets. This requires durability of contact and perception that the enemy has the capacity to inflict actions in kind. Geoffrey Parker maintains that "cooperation between enemies requires neither rationality . . . nor trust, nor mutual communication (because deeds speak louder than words)."[31] Tacit agreements do not rely on communication spelling out the terms. Tacit agreements (bargains) stem from an interactive relationship that develops rules based on a *reciprocal* recognition that both sides have the capability to utilize certain means or tactics and that the initiation or use, given the possibility of retaliation in kind, would have costs that would negate any potential positive gains in advantage. A great part of the usefulness of tacit bargains derives from the uncertainty surrounding their precise limits. Indeed, Thomas Schelling argues that overt attempts to define tacit bargains more precisely could have the effect of undoing them.[32] An often-cited example comes from the Korean War. The United States refrained from bombing a North Korean supply line that ran through Chinese territory (Yalu River as the boundary); the Chinese did not mount attacks on U.S. bases in Japan.[33] While some tacit agreements may be only conflict specific (Korea), recurring conflict can produce rules that persist over time. References to the customary law of war reflect expectations that have emerged over time from repeated interactions among adversaries who have developed a common understanding about a "culture of war" and the limits of engagement therein. David Kennedy asserts that "military professionals also have desires for law. For starters, they also turn to law to limit the violence of warfare, to ensure some safety, some decency among professionals on different sides of the conflict."[34]

A third pragmatic consideration stems from circumstances. Prior to World War I, conquest formed an acceptable way of gaining title to territory. Economic circumstances dictated that often the people on the land had as much importance as the land itself, if only as slaves. The dead cannot pay tribute or taxes or serve as slaves. Of course, in cases where the land formed an end in itself, perhaps as an outlet for overpopulation (e.g., Greek expansion into Asia Minor), this consideration had little meaning. The idea of "ethnic cleansing" has some ancient roots.

CAUSES AND MOTIVES

In one of the most cited passages associated with war, Thucydides writes: "The Spartans voted . . . that war must be declared, not so much because they were persuaded by the arguments of the allies, as because they feared the growth of the power of the Athenians."[35] Throughout his *History of the Peloponnesian Wars*, three motives—fear (security), honor, and interest—appear in various combinations to describe reasons for actions taken by both Athens and Sparta. Contemporary authors have identified more specific causes. But, all can still reduce to these three in the sense that, as umbrellas, they shelter many different fears, claims about honor (reputation), and definitions of interest. To these three, we should add the personal ambition and ego of leaders as individual wild cards that define interest and honor. Visions of glory and valor, and the desire for power and position, are powerful personal motives that can affect how people define fear, honor, and interest. One must wonder what Thucydides might have concluded if he had lived a hundred years later and had the opportunity to analyze the campaigns of Alexander the Great and draw on the reflections of Aristotle. Nonetheless, the observations of Thucydides still seem remarkably perceptive even today. Consider the logic of the "domino theory" used to justify U.S. engagement in Vietnam: it combined all three elements: fear of the spread of Communism, an interest in keeping Communism "contained," and honor (reputation) in that not acting would undermine U.S. credibility in other situations.[36]

Historically, wars have happened mainly because people wanted something they thought they could not obtain otherwise, be it security (fear and interest) or empire (interest). Bertrand Russell has observed that "most of the disagreements that occur in practice are not as to what things have intrinsic value, but as to who shall enjoy them."[37] Aristotle characterized war as one of the "natural" means of acquisition (a *techne*).[38] In the case of Sparta, the goal was an intangible good—fear mandated they should try to create a greater margin of security to protect their "way of life," which depended on the total suppression of the helots as slaves. The reaction of Western societies to the depredations committed by Islamic radicals is only the latest manifestation. A study of the historical record to identify what people have fought to obtain will show that acquisition, control, and defense of territorial rights stand at the head of any list for war in any era. Today more than ever, the issue of who shall control a particular bit of territory forms the root of the vast majority of conflicts.

In the absence of widely accepted legitimate third-party arrangements to promote peaceful settlement of disputes, might has often substituted for adjudication as the mechanism to secure redress for any claim of right, however capricious or indefensible. Holding land in these circumstances means protecting it. During the Middle Ages, private wars, vendettas, and long feuds over petty stakes often divided families into warring camps. In relatively densely populated areas, such as Flanders, many of the sons of large noble families found no land available, and those who were less well-off were filled with envy of the more fortunate. J. F. Verbruggen notes: "In the rough and tumble life of the 11th and early 12th centuries violence played so great a part that it could only be put down by the ruthless and uncompromising action of a strong personality."[39] A verse from William Wordsworth's poem *Rob Roy's Grave* (1803) captures well the ethos of the situation:

Because the good old rule
Sufficeth them, the simple plan,
That they should take who have the power,
And they should keep who can.

Obviously no clear rules governed. Until the succession of Henry VIII, consider the bloody contests surrounding the right to rule England. The self-interest of those lesser than kings who might see an opportunity or a threat drove many conflicts.

Territorial issues encompass empire building and maintenance, state consolidation (or in medieval times, extension and consolidation of personal holdings—private war), and on the other side of the coin, movements for self-determination/national liberation. Add to these, apart from movements of self-determination, the maintenance of control from both internal and external challengers as well as questions of succession (dynastic control).[40] Other causes and motives arise out of specific times and places. For example, protection of commerce and navigation rights ranked at the top of any list for Carthage, Venice, and Great Britain but meant little to Alexander the Great, Genghis Khan, or Russian tsars. Prior to the Treaty of Westphalia (1648), in Europe religious issues were at the root of many bloody conflicts. In the contemporary era, religious differences, ideology, and nationalism, separately and in various combinations, have fueled a number of conflicts, both interstate and intrastate. The Balkan Wars that happened with the breakup of the former Yugoslavia occurred in part because Slobodan Milošević, president of Serbia, fanned the flames of Serbian nationalism as a means of enhancing his own political standing and power. The result yields another example, among many, of where asserting an interest by one group can build fear in others.

THE PARAMETERS OF WAR

The earlier discussion has suggested four important factors that affect both a state's (actually a particular government's or individual's) capacity to wage war and the possibility of agreed restraints: the level of interaction, perceptions of relatively equal capability, the level of technology, and the capacity to mobilize and command. Obviously, a perception of equal capability will depend on familiarity gained through some level of sustained interaction. The level of technology, both nonmilitary and military, stands out because of its importance in terms of possible weapons, tactics, and modes of command/control. The level of technology determines the terms of warfare and defines the resources needed. Within the civilian sphere, it also determines the resources needed to sustain a particular society and the means of acquiring those resources. Technology as a generic concept means more than specific machines and weapons in that it also includes techniques in the sense of the Greek *techne* (craft or art)—developments such as alphabets and written communication. We can see the importance in the names historians give to significant eras: Stone Age, Bronze Age, Iron Age, Machine Age, Nuclear Age. Each describes the significance of a technology or set of technologies for patterns of social behavior within a specified time frame.

However, in his classic work *Technology and War*, Creveld warns of projecting opinions and beliefs about the present centrality of technology in contemporary life backward into the past.[41] The centrality of technology is a very recent phenomenon, dating only from the latter part of the 19th century. One may marvel, but the author's maternal grandparents never lived together in a house that had electricity, central heating, or indoor plumbing. His grandfather was 24 when the Wright Brothers first flew and 46 when television was patented, but just before he died, while living in his daughter's comfortable centrally heated/air-conditioned house, he saw men walk on the moon in "living color" on TV. The pace of technological change has a huge impact on questions relating to rules. In the contemporary world, the rate at which new developments have occurred may have exceeded the capacity of current institutions identified as part of "international governance" to assess, deliberate, and evolve new rules, or modify existing ones, in timely response.

Two additional points deserve emphasis here. First, note the Janus-faced nature (dual use) of many technologies. Many valuable technologies used as mainstays of everyday life often have military value. Bows and javelins can either kill game for the table or men in war. Horses provide transportation in peacetime, mobility in war. The microprocessors used in laptop computers also guide smart weapons and make possible smaller, more efficient thermonuclear warheads. In a disarmed world, a 737 carrying explosives used in mining would have more destructive capability than a B-29 carrying a conventional bomb load in World War II. Second, in trying to discern important patterns and trends over time, the analyst faces the issue of emphasis and balance in terms of what has changed or what has not.

Over most of recorded history, technology has served as a limiting factor, although this observation would seem somewhat at odds with the stories of total destruction earlier and the appearance of empires that occupied vast areas. Still, many of the massacres occurred after defeats, particularly after the end of a successful siege, not as battlefield casualties. Limited technology does not necessarily preclude massacres—the slaughter merely takes longer. During the two-year invasion of Italy, Hannibal's forces would kill, wound, or capture more than a third of the available Roman manpower pool.[42] To add to earlier examples, at the battle of Pydna (168 BC), the Romans slaughtered an estimated 25,000 Macedonians.[43] In a scene repeated many times in history, because of panic and an unorganized retreat after an ambush during the Battle of Oriskany (1777), the American militia suffered over a 50 percent casualty rate: "Most of these men panicked and fled; some of the attacking Indians pursued them, resulting in a string of dead and wounded that extended for several miles."[44] This was the single bloodiest battle in the revolution. The single bloodiest day in American military history occurred at Antietam during the Civil War before the appearance of modern breech-loading cannon and repeating rifles.[45]

Second, in terms of empire, one should not assume that ancient centers maintained an absolute control over their peripheries and more distant provinces. Successful governance depended on communication and military mobility—road building played a key role, as did placing armed garrisons and trusted administrators in strategic areas. Empires formed by conquest tend to engender situations that necessitated constant military action. Personal ambitions of local administrators, restless populations, and various incursions from border raids to full-fledged invasions formed continual challenges in the life of all empires.

Within the limits of technology, the Hittites, Assyrians, and Romans among others managed to conquer and maintain large and diverse areas. A critical point here is that new technologies, even those that gave a military edge, were not quickly disseminated. The Hittites retained a decisive advantage over several centuries simply because they had managed to develop the knowledge and techniques to fashion weapons from iron ore.[46] To compete, opponents using softer bronze weapons would have had to have access to the ore as well as the knowledge of how to extract the metal from the ore (smelting) and techniques for fashioning the iron ingot into usable form. To provide perspective, Native American tribes who occupied the area of the Mesabi Range in Minnesota never developed the capability to utilize the ore. For these tribes, lacking the appropriate technology, iron did not constitute a resource.

Creveld asserts that by 600 BC, all the weapons that would dominate warfare for the next two centuries had been invented. Further, he observes: "Although the array of weapons available was thus relatively modest, the number and variety of different styles of warfare that they made possible was truly astounding."[47] In sum, for 2,000 years, innovation consisted not in new weapons but in alterations and combinations of existing ones. The knowledge to make and use some innovative weapons, "Greek fire" for example, became lost.

THE RISE OF WESTERN EUROPE

During the sixth and seventh centuries, Western Europe had become increasingly isolated from the centers of civilization, which in turn resulted in a drastic decline in commerce. As commerce dwindled to nothing, the economic crisis depleted the fortunes of ruling elites in the West, forcing a return to dependence on agriculture and a primary economy based on barter.[48] Without the resources essential for maintenance of the administrative structures inherited from Rome, central governing structures atrophied with effective power passing to local officials. A hierarchy of complex personal relationships displaced the older formal institutional structures and offices. Land ownership became the sole source of wealth and political power.[49] Governance became the province of those local magnates who had the wealth, capacity, and energy to defend their position and acquisitions from other ambitious men. Individual energy, ambition, personality, and willingness to use brute force defined the requisites for survival in the political realm. Violence and the threat of violence permeated the fabric of society.

During the ninth century, the civil wars caused by struggles for dominion and influence as Charlemagne's empire disintegrated combined with a series of invasions by Magyars, Vikings, and other marauding bands to accelerate both the trend of political-military decentralization and that of violence as a legitimate technique for gaining and maintaining political advantage. Given the primitive nature of communication and transportation, and the dearth of military resources directly controlled by kings and princes, defense against the mobile tactics of the raiders fell mainly to local inhabitants. Success rested on the ability to call out a force of soldiers and knights within a relatively short time. Phillipe Contamine describes the result: "In tens and hundreds, principalities of every size became centres of independent military systems, including, in addition to specific means of attack and defense, the right and power to declare, pursue and terminate war."[50]

Although the development of feudalism did not take hold in every part of Europe, or with equal effect in those areas where it did have an impact, the idea that "all politics are local" still applied across the board. The reality of political fragmentation conflicted with the ideology of imperial unity. With the revival of an active legal and theological scholarship in the 11th and 12th centuries, advocates of the pope and Holy Roman emperor consistently advanced claims to exercise sole authority on behalf of the Roman people, now defined as the society of Christendom; but ecclesiastical authority increasingly applied only to the forum of conscience, and a preponderant majority of the Roman people demonstrably rejected imperial authority.[51] Ironically, while the claims with regard to exercising imperial political authority foundered, those advanced on behalf of the universality of the rule of law, also ostensibly defined by the heritage of Rome, gained strength.[52]

In theory, a society organized on feudal principles entailed universal military service with the landholding nobility providing the leadership and the bulk of soldiers trained in special skills. Fiefs, grants of property or rights, often transferable through inheritance, given by a superior in rank to a vassal, formed the central structural component of feudalism. Vassals held a fief in "fee," meaning on condition of allegiance and service.[53] As it proceeded, the process of subinfeudation contributed to the demise of the system because it produced fiefs of ever diminishing size, which in turn lessened the capacity of each fief to support a knight or man-at arms. Subinfeudation weakened and eventually destroyed the connection between landholding and military service because small holders lacked the resources to equip and support a man-at-arms. Practically, as the process of subinfeudation continued apace during the 11th through 13th centuries, other trends that would eventually undermine the military and economic foundations of the system were already identifiable as well.

The reappearance of commerce and a money economy reinforced political trends that contributed to an eventual total disassociation between land tenure and military service.[54] By mid-twelfth century, many obligations, once a matter of personal duty as a fief holder, now could be satisfied through payment in coin. Poverty, overpopulation, political failure, and natural disasters played their part as well by contributing to the supply of those willing to be, to use the words of Thucydides, "persuaded by pay."[55] The question, though, is what changed the nature of the demand side of the equation to make the potential supply a relevant factor? The mere availability of willing numbers and money to pay them does not necessarily translate into large-scale mercenary employment. Utility forms the important intervening consideration. In this case, changes in the nature of warfare had made the infantry an increasingly important constituent element of strategy. The renewed significance of infantry put a value on numbers, experience, and specialized skills.

Pay did not immediately displace the elaborate system of personal obligations. Contamine observes: "It is astonishing, in these conditions, what constant care the authorities displayed in order to maintain, if not reinforce a system of obligations, when this system had resulted more and more frequently in the payment of wages."[56] This observation particularly held true in France and England, where kings still led major campaigns. The answer may lie in the continued reliance on expensive armored cavalry, which entailed questions of training as well as maintenance. The terms of supply may have changed from personal obligation to monetary payment for service, but short of a permanent standing force and its enormous costs, what other system could support the ongoing expense? Nonetheless, cost became an important limiting factor even with respect to personal service. For example, in 1297, the Earl of Arundel declined to accompany Edward I on an expedition to Flanders because he could not afford to pay those asked to serve in his retinue from his own revenues and could not find anyone to lend him money against his future revenues.[57]

The continual growth in recruitment of and reliance on mercenaries added another factor. The costs of warfare quickly escalated, forcing monarchs and magnates alike to find new sources of revenue or to extract more from extant sources to acquire the requisite funds. Fourteenth-century popes sometimes spent as much as 60 percent of their revenues on war.[58] In the first years of Edward III's reign, the annual peacetime revenues due the Crown averaged £30,000–40,000. Apart from other expenses, two months' wages alone for the army during the siege of Tournai (1340) amounted to £60,000.

Early in the conflict, the need for money to support the war effort drove both English and French kings to extreme measures in terms of taxation and other novel schemes. The tactics of Philip VI in France, which included debasing the coinage and having the silver vessels of his household knights melted for their value, reminds one of the stratagems of Dionysius in Syracuse. In England, the requirement for increasing revenue while minimizing the possibility of opposition at home had the unintended consequence of strengthening the power of Parliament as an independent political force vis à vis the king.[59] Additionally, the increasingly heavy burden of taxation may have undermined support for English rule in the continental holdings.

From the third quarter of the 14th century, the core of the English army was formed by gathering retinues of variable size, recruited according to

Table 1.1

Purchasing Power of £1 in 1350

In the 14th century one pound sterling would:

- Support the lifestyle of a single peasant laborer for six months
- Support the lifestyle of a knight for one week
- Buy a carthorse or two cows or 10 ordinary books
- Rent a craftsman's townhouse for a year
- Hire a servant for six months.

Source: "Buying Power of 14th Century Money," *A Commonplace Book: Deeds of Arms and Other Matters Medieval and Otherwise*, http://willscommonplacebook.blogspot.com/2008/07/buying-power-of-14th-century-money.html

the terms of contracts called indentures for war. Alongside contracts drawn up between the leader of an expedition and his captains, subcontracts allowed the captains to recruit their own contingents, a practice that continued into the 15th century.[60] P. S. Lewis describes the armies of Edward III as paid professionals.[61] Clearly the non-English who joined Edward's army with their companies deserved this title, but it applies equally to the English captains who made their fortunes abroad, and perhaps even to the English nobility who maintained their fortunes in land with the profits of a career in arms, and to the bulk of the rank and file raised on contract in England. Feudal arrangements had a little more resilience in France, but kings often found it advantageous to hire experienced infantry rather than having to recruit from scratch or rely solely on royal decrees summoning vassals and sub-vassals for military service (*ban* and *arriere-ban)*.[62]

The initial concerns with controlling the activities of mercenaries surfaced with the increased use of mercenary foot soldiers and auxiliaries recruited from the lower classes. The problems did not stem from their performance in the field but from their tendency to support themselves through raiding and pillaging the countryside when not otherwise gainfully employed. Larger armies meant more soldiers. Peace created unemployment because few employers had the means or the motivation to support soldiers when not at war. Indeed, wages during war often went unpaid because the employer lacked sufficient resources. Medieval soldiers often demanded protection money from both friendly and hostile territory. To add to the problem, the devastation of France in the 14th century threw large numbers of other opportunists into the mix. Certainly men of criminal background and low degree appeared in significant numbers, but the nobility, younger sons with little hope of inheritance, and impoverished nobles, who "could neither meet the obligations as vassals nor ensure the maintenance of order," increasingly resorted to banditry and brigandage as well.[63]

Christine de Pisan made the logical observation that, if mercenaries were paid adequate and just wages, they would not need to resort to plunder,[64] but the activities of unemployed soldiers would plague Europe until the development of standing peacetime armies. Italian, French, and English practices in the 14th and 15th century provide a rather pointed illustration of the dilemmas produced by reliance on mercenaries when employers cannot draw from other sources and lack sufficient resources to pay for full-time service. The cost of mercenary troops proved such a substantial drain on the treasury that employers frequently failed to pay or disbanded them after a campaign with few options other than living off the countryside. Because of the fragmented nature of political authority in Italy, southern France, and northern Spain, the companies operated with something akin to impunity during peacetime because local authorities lacked the means to suppress them. Many companies could best be described as temporary alliances for the purpose of exploiting the civilian population. These normally disbanded when the company had gathered booty sufficient to satisfy the majority.[65] While the early companies could not be considered significant military threats to any major city, the fragmented nature of political authority complicated by the rivalries among the cities meant that such ad hoc groups seldom faced effective opposition to their activities.

Writing in the third quarter of the 14th century, Giovanni da Legnano, an Italian jurist closely associated with four popes, confirms the changes in attitude: "We may infer that infantry are more necessary to the commonwealth than cavalry, because they are useful everywhere."[66] He cautions those who would serve for booty, but not surprisingly given his long and close association with the papacy, Legnano avoids any mention of abuses perpetrated by mercenaries, although he had to be aware of the depredations of the mercenary companies and their activities. In this he falls within the mainstream of commentary.

Change and the Gunpowder Revolution[67]

One of the most interesting questions in the history of warfare centers on why gunpowder weapons became a preferred arm in an era when traditional arms and tactics could still provide a tactical edge. As late as the Battle of Oriskany, Native American and Canadian forces fighting with the British took a toll on the American militiamen by simply waiting for an individual to fire then attacking while he engaged in the cumbersome reloading process. A change in tactics, whereby the militiamen worked in pairs, one firing or "protecting" the other while reloading, somewhat offset the effectiveness of the tactic, but still, until the introduction of breech-loading repeating weapons, the formations necessary to utilize muzzle-loaders severely constrained tactical flexibility. As a measure of the pace of change, with some minor improvements to the firing mechanism, British infantry used the "Brown Bess" musket as the standard-issue weapon for well over a century. The introduction of a cartridge, an integrated bullet and powder package, improved rate of fire, but not until technology (milling) could produce a completely sealed breech did muzzle-loading weapons disappear.

The gunpowder weapons eventually led to dramatic changes, but the transformations in political organization and governance had a greater impact than technology prior to the latter half of the 19th century. Philip Bobbitt describes the transition as an evolutionary movement "from princes to princely states" (1494–Treaty of Westphalia in 1648), "from "kingly states to territorial states" (1648–1776), and from "state-nations to nation states" (1776–1914).[68] This marks a movement in terms of rationalization of reasons for going to war from personal/ dynastic/trans-"national" ambitions to strictly "national interest," although that interest often included expansionist/revanchist goals (France after 1871 for example, to redress German gains in terms of "French" territory). During the evolution of the modern state system in Europe, the ambitions and demands of the large and powerful clearly structured interactions in the international arena.

Military power and access to the requisite resources to sustain it formed the essential elements of statecraft. While the Peace of Westphalia (1648) produced myriad small, nominally independent entities—Germany alone encompassed almost 300 political units with some claim to sovereign status—these units seldom exerted influence beyond their immediate localities. Over the next 225 years, the small and weak routinely fell prey to the ambitions of their larger, more powerful, and ambitious neighbors.

An understanding of contemporary war and the problem of regulation requires examining the major transformations that occurred after Westphalia, especially during the last half of the 19th century. Relevant to the theme of this book, Robert Osgood argues:

> Psychologically and spiritually, the beginnings of modern military power must be traced to the erosion of esthetic, moral, and cultural constraints on warfare under the impact of a secular, rational, utilitarian approach to force in international politics; to the more recent injection of popular national and ideological fervor into state policy; and to the depersonalization of warfare that has accompanied military specialization . . . , the increasingly technical nature of military management, and *the increasing remoteness of the inflictors of great destruction from their victims*.[69]

Osgood characterizes the changes as the "rationalization, centralization, popularization, professionalization, and modernization of military power."[70]

The Thirty Years' War (1618–1648) witnessed a sea change in the size of armies. The 17th and 18th centuries saw the growth of professional standing armies loyal to a king or prince. The advent of gunpowder weapons and the increase in the size of armies required units better organized, trained, and disciplined than those engaged in the medieval mêlée—a chaotic close combat that had little or no central control once it started. Ammunition that lacked a consistent quality because of casting methods coupled with the inaccuracy of muskets meant that effective fire involved coordinated volleys as well as discipline and efficiency in performing tasks such as reloading. The necessary discipline demanded a "professional" army trained and drilled in appropriate techniques. At this point, technology still stood as a limiting factor in the ability to project and use force.

The dynastic wars (1680–1713, Treaty of Utrecht) during which the Great Powers consolidated their territory and status provided the impetus for internal measures that created standing armies, rationalized their finance, and created mechanisms to arm and otherwise equip them. The need to wage war forced states to develop institutions that permitted them to wage war more effectively, or as Jack Goldstone pithily summarizes, "states making wars making states making war."[71] For example, Louis XIV developed a very large standing army that could not have occurred or been sustained without the centralized civilian bureaucracy to manage the army and the logistics of war-making. What we see as institutions that define the modern bureaucratic state have issued from innovations essential to support the idea of warfare as a necessary, ongoing, and permanent part of governance. Curiously, the pragmatic concerns with raising and maintaining these armies also led to pragmatic constraints on their active use.

The growth in the costs of building, training, and maintaining such armies led to a concern for conserving their numbers that translated into a hesitation to risk soldiers in direct bloody encounters. Self-interest dictated restraint. Diplomacy might offset or minimize an adverse result. Between Westphalia and the French Revolution, siege and maneuver rather than engagement with the purpose of inflicting large numbers of casualties became tacit rules based on mutual interest. In one other important development, the move to state-paid and provisioned "national" armies also had a noteworthy side effect in terms of humanitarian considerations. It lessened the burden on ordinary citizens in that it considerably reduced the pillaging and other depredations considered a legitimate part of medieval and early modern warfare. War may have been endemic, and expensive, because other than diplomacy, the lack of economic and other transaction links that might provide leverage on issues meant that often war formed the only means to exert coercive influence on the other party.

From Subjects to Citizen Soldiers—Democratization and the Resort to Force

The Maréchal de Saxe (1732) could rhapsodize about "an inexhaustible supply reservoir of fine recruits who would not be subject to desertion."[72] Frederick the Great could fantasize about the value of patriotic citizen forces in comparison with the evident deficiencies of his current recruits.[73] However valued citizen forces in the abstract, few 18th-century rulers enjoyed a position where the suppositions of superiority could be tested by practice. Absolute in theory, 18th-century rulers faced a political reality in which mercantilist economic ideas, the privileges of the nobility, and the indifference of their subjects severely constrained their freedom of action. In continental Europe prior to 1789, the greatest proportion of the tax burden was borne by the peasantry. The strictures of mercantilist political economy dictated conservation of productive citizens. The dynamics of politics in every dynastic state embodied a precarious political balance between ruling houses and the aristocracy. Powerful magnates, as well as many well-organized local communities, resisted subordination to the central authority of king or prince. So, on the one hand, throughout the 17th, 18th, and 19th centuries, internal politics in many continental states still revolved around the struggle of monarchs and princes to enhance and extend their authority by reducing the autonomy of the nobility. However, on the other hand, fear of "the rabble" conditioned any move toward arming or otherwise empowering subjects. In fact, post-Napoleonic France returned to old methods of selective conscription. The modern cadre/conscript concept did not take hold until after Prussian victories late in the 19th century. In the old system, mercenaries were politically safe, and given the rigid nature of discipline and tactics, reasonably effective. The cadre/conscript model reached its ultimate peak in World War I and World War II.

The French Revolution changed ideas about who should fight in war. In Europe prior to the French Revolution, the idea of citizenship as now understood did not exist except in classical texts. The Athenian ideal of citizens who regarded their bodies "as expendable for their city's sake" did not exist.[74] Subjects did not consider themselves as owing a ruler any more than paying taxes (if they could not evade them). Some rulers certainly were more popular than others, but popularity did not necessarily translate into any sense of fundamental obligation. The divide between rulers and the ruled was enormous. From the standpoint of rulers, a palpable tension existed between the need for manpower and the fear of arming citizens. Living in a particular locality did not signify that a person thereby acquired a bundle of universal political obligations to the "state." Ordinary citizens expected little in the way of benefits from their rulers. Besides providing tax revenue, rulers expected little from their subjects beyond passive obedience. R. R. Palmer summarized the relationship between rulers and ruled:

> A good government of the Old Regime was one that demanded little of its subjects, which regarded them as useful, worthy, and productive assets to the state, and which in wartime interfered as little as possible with civilian life. A "good people" was one that obeyed the laws, paid its taxes, and was loyal to the reigning house.[75]

The social composition of most armies formed another important constraint. The army did not constitute a popular institution in any European state. Citizen/subject recruits, like those from elsewhere, were primarily drawn from those economically most useless. Some few adventurous individuals might join because they liked the life, but most served because they were coerced, had no other reasonable alternative for earning a living, or were avoiding far worse alternatives. To keep armies at strength, states emptied their prisons, resorted to deception, and permitted outright abduction; in crises they still looked to mercenaries, not subjects, to generate sufficient numbers. Despite draconian penalties, desertions plagued all armies, not a surprising result since states now drew on the least reliable members of society for their soldiers. Volunteering as an enlisted man meant joining the outcasts and dregs of society, quite possibly foreclosing any future return to civilian society. For soldiers, the army was merely a means of making a living, not a commitment to fight and die for a cause.

The French Revolution and Napoleonic Wars form an obvious divide in the sense that events moved the debate over the principles of legitimate rule from the abstract musings of Enlightenment philosophers to a primary place in the empirical world of political action. Nonetheless, effective diffusion and acceptance of the radical new view of citizenship that entailed reciprocal obligations and equality under law required a lengthy learning process as well as a substantial improvement in the material conditions for the bulk of the citizenry. Receptivity depended on the development of a standard of living more than nominally above subsistence and of a dense network of interdependent transaction links among subjects, which would promote the idea of a unitary community that extended well beyond the village or province.

Dislocations caused by industrialization provided challenges and opportunities. Abolition of internal barriers to trade, revisions of legal codes, diffusion of new agricultural techniques, a substantial improvement in literacy, and evolution of a market economy interacted to produce significant changes in the domestic political environment of every European state. The lessening of trade barriers promoted the development of dense networks of transaction links across broader areas. Notably, each of these tasks not only reinforced the trends associated with the others but also required a continual, centrally organized and extended intervention in society to ensure effective diffusion across the country. More efficient farm techniques freed labor and provided surpluses for sale. Revised legal codes placed all citizens on an equal footing before the bar. Programs aimed at improving mass literacy supplied the means of transmission for the intellectual ideas that form the essential core of modern nationalism.[76]

While nationalism aided the continuing centralization of power in terms of the institutional developments associated with state-building, it also bore the seeds of potential fragmentation based on developing nationalistic passions in areas/groups that produced demands for self-determination. Early in the century, fear of the excesses of the revolution, inescapably associated with liberalism, tempered domestic politics in all European states. After World War I, it would lead to the dismantling of the German, Ottoman, Russian, and Austro-Hungarian Empires. Nationalism in the modern sense connected more to the conservative elements in British and French domestic politics than to the liberal, perhaps because the litmus test of liberal platforms, the establishment of constitutions to curb arbitrary power and guard citizen rights, had already taken deep root.[77] Clamor for progress toward increased popular sovereignty generated conservative reactions from the rapidly expanding middle class, which shared with the nobility a reluctance to extend meaningful participation in the political process to classes that they perceived as uneducated, irresponsible rabble. Louis Phillipe, the bourgeois king (1830), did become *king of the French* rather than the king of France, but that did not imply a revolutionary mandate to extend political privilege to all of the French.

From a strictly military viewpoint, by no means did the military lessons of the French Revolution lead to an unequivocal conclusion that citizen-based armies were superior to those garnered from the old system of recruitment. What impressed was the ability to mobilize large numbers—the idea of a mass army. The same arguments that supported mercenaries or long-term professionals as the solution to the problem of political reliability apply equally to issues concerning military efficiency. Proficiency required long-term service of some type, whether by paid foreigners or paid subjects. Moreover, Wellington's professionals had fought well in the extended end game against Napoleon. While the French resort to citizens produced numbers, the problems of recruitment and desertion and questions about military discipline and efficiency remained.[78] The Prussian collapse at Auerstadt and Jena (1806) might have convinced reform elements in the Prussian army of the military value of the nation in arms. The embarrassment did produce a short-term impetus for reform. Nonetheless, from almost any vantage point, the disasters resulted from bad strategy and myopic political decisions, not from the nature of the army itself. Pragmatically, as armies had grown in size, the problems of intelligence, command, communication, and control severely limited the utility of increased mass.[79] Technology came to the rescue in the form of railroads and telegraphs.

What set of factors finally produced decisions to move away from a system of recruitment and organization that had worked reasonably well for 400 years to one that involved considerable political risk with little empirical evidence to support assertions of increased benefits? In retrospect, analysts might find inevitable trends but from the perspective of military operations throughout the first half of the century, many questions about making effective soldiers and armies from citizen material had no clear answers based on experience. The long peace in Europe offered no opportunities for empirical tests of the various suppositions associated with competing models.[80] After Vienna (1815), until the Crimean War, war avoidance rather than assertive pursuit of foreign-policy goals formed the essence of Great Power practice. Given the challenges to aristocratic structure unleashed by the egalitarian ideology of the French Revolution, European states spent the first 50 years after Vienna afraid of themselves in the sense of fearing internal upheaval and revolution. As continental armies grew, states spent the second 50 years being afraid of each other but diverted from European ambitions by the failing Turkish Empire and the opportunities of colonial expansion. Other than the two quick wars fought by Germany against Austria-Hungary (1866) and France (1870–1871), no other incidents in the interim provided clear and compelling lessons to stimulate influential elements of political and military elites to consider changes other than copying elements of the German model of professionalization. Laying aside the Crimean War, a quasi-colonial conflict on the periphery, between 1815 and 1914, the major states were at war with each other for approximately 18 months in total. The lessons of the wars fought, including the colonial Boer War (though occurring in the colonies, still fought between sides consisting of good, civilized WASP settlers), would generate the completely false assumptions and expectations about the nature of war held by political and military elites at the beginning of World War I.

In the world of military technology, little changed between 1714 and 1856. Yet, the passage of the 28 years from the Peace of Paris (1856), ending the Crimean War, to the Congress of Berlin (1884) saw a total transformation in shipbuilding and weaponry from wooden ships powered by sail, mounting muzzle-loaded cannon, and infantry carrying single-shot muzzle-loaded muskets to iron ships powered by steam equipped with breech-loaded guns and infantry equipped with breech-loaded repeating rifles. The railroad and telegraph revolutionized transport and communication. These changes that would have a great impact on the conduct of war occurred in a virtual vacuum in that World War I became the first true test of the effects flowing from the technological revolution in weaponry that had taken place during the last part of the 19th century. The narrow focus of an evolving *professional* military expertise in the wake of the German successes against Austria and France bred an ethos that increasingly isolated military planning from civilian "political" concerns.[81] Strategic planning took place according to the precepts of war as determined by the professionals, using the examples they deemed most appropriate. Those outside the profession, no matter their reasoning or evidence, had little impact. Note that in 1914, all armies still regarded the horse cavalry as an important branch. Indeed, the Red Baron, Manfred von Richthofen, began World War I as an officer in a horse cavalry regiment until, frustrated by lack of combat action, he requested a transfer to the Air Service in 1915.

War and Change

The chastening carnage of World War I put an end to most romantic reflections about war. The war resulted in the dismantling of four empires—the Russian, the German, the Ottoman, and the Austro-Hungarian—and the creation of many new states based somewhat on the principle of "self-determination." The economic dislocation and manpower losses had made most European governments fear any events that might lead to another war. For Britain, the long-term costs had included a great many of the "best and brightest," those who would have been future leaders in their fields of endeavor. A brief examination of the memorials to those killed in WWI in the chapels of any of the colleges at Oxford or Cambridge drives home the magnitude of the loss. In France, one in three of the male population (including infants and the old) were killed or wounded during the war (1914–1918).[82] Other long-term damage was less immediately obvious. Devastated landscapes in northern France gave tangible evidence of loss. In the case of Britain, liberal assumptions about the impact of war on trade proved absolutely true. Sunken ships and lost markets left few visible signs. The United States and Japan had filled the void left by Britain's inability to service overseas markets while engaged in fighting on the European continent. Britain never regained many of the markets lost and found itself increasingly unable to compete for new ones.[83]

Versailles, as the first major peace treaty negotiated by statesmen who had to consider public opinion, had a quite different tone and purpose from the Vienna settlement of a hundred years earlier. The concern shown then, for creating a settlement that would "rehabilitate" and reintegrate France into full membership in the European society of states as quickly as possible, found little resonance at Versailles. A comparative study of the processes and outcomes of Vienna and Versailles clearly illustrates the impact of nationalism and public opinion on the policies of states. The goal of not creating a pretext for a future war so evident at Vienna 100 years before gave way to the popular demand that Germany needed to be punished for the transgression of starting a war no one really opposed.

The settlement did give birth to the first formal institutionalized attempt at preventing war by creating the League of Nations. As a note in passing, the league did not outlaw war; it sought to prevent the recourse to war through open diplomacy, reason, consultation, and collective pressure.

The evolution of technology blurred the distinction between civilian and military targets because manufacturing capabilities now formed part of a nation's capacity for waging war. The obvious way to cripple a military effort would be to destroy large parts of an enemy's industrial base and to erode civilian morale and support. As noted by Osgood earlier in this chapter, moral and aesthetic considerations went by the wayside in the heat of war. In World War II, German attacks on London had no other function than to undermine civilian morale and will. The Baedeker "Blitz" (Baedeker raids) comprised a series of *Vergeltungsangriffe* ("retaliatory raids") by the German air force on English cities, ostensibly in response to the bombing of Lübeck in March 1942.[84] Whatever the rationales, or claims for increased technical precision, the damage from bombing raids took an enormous toll on civilians on both sides, ending with the raids, the firebombing of Hamburg and Dresden in Germany, and the use of atomic bombs on Hiroshima and Nagasaki in Japan, which destroyed substantial parts of major cities. On the ground, on the western front, the Germans, with some notable exceptions, generally observed the international rules of war. In contrast, they waged a war of devastation and extermination against the Soviet Union on the eastern front. Given the losses suffered by the Soviets from July to December 1941, "the fact that they even survived the war, much less serving as one of the major contributors to the defeat of Germany, is astonishing given the losses it suffered."[85]

Although World War I had started Europe's decline, World War II ended the dominant role of Europe in international politics while sealing the ascendance to prominence of the Soviet Union and the United States. For the next 45 years, the East–West rivalry between the two superpowers would structure international political interactions. The rapid evolution of nuclear arsenals would produce what Albert Wohlstetter termed "the delicate balance of terror." The advent of thermonuclear (hydrogen/fusion) weapons raised the issues, briefly discussed earlier, of whether or not anyone could realistically speak of winning a war with nuclear weapons. The charter of the United Nations would prohibit the resort to war except in cases of individual or collective self-defense (Article 51).[86] Yet more men and women have died in conflicts since World War II than died in that actual war.

The nuclear revolution contributed to a set of circumstances not foreseen by those who diligently hammered out the provisions of the charter. A commonplace observation about major peace conferences holds that they all look back in the sense of trying to prevent the war just ended. Certainly that holds true for Westphalia (1648), Utrecht (1713), Vienna (1815), and

Versailles (1919). Interestingly, each of these treaties that ended major conflicts contained language authorizing collective action against signatory states that violated the treaty. Only in the aftermath of Vienna did these provisions give rise to any attempts to make the treaty rhetoric a reality. While not a peace treaty, the same conclusion holds for the charter. The classical form of state-against-state warfare did not materialize as a major problem. Instead, colonial wars for independence (demands for self-determination), low-intensity conflicts (LICs, guerrilla warfare, terrorism, etc.) of various types, and civil wars (particularly those waged for postcolonial control) that have many elements of LICs have dominated the post–World War II political landscape. The idea that only another Great Power could make meaningful threats against a Great Power, or counter its military might, would die in the killing fields of Vietnam, Afghanistan, and other such venues and the rise of organized international nongovernmental terrorist groups. Moreover, a large part of the abstract military capability controlled by the Great Powers has little relevance for countering the types of low-level challenges posed by contemporary forms of conflict. No matter how sophisticated, nuclear weapons, tanks, intercontinental bombers, and many other weapons designed for use in conventional warfare do not provide any advantages in dealing with low-level threats and challenges that can have a significant impact on security.

The contemporary landscape has produced a set of interesting problems in terms of perceptions in the United States and Western Europe concerning the definition and response to present-day problems. After Korea, the United States and Western Europe have attempted to substitute technology for manpower. The reasons for this go beyond the purposes of this analysis but have a substantial impact on many of the issues pertaining to the "legal" conduct of future warfare. Robots, drones, and other "smart weapons" now not only support troops but substitute for "boots on the ground."[87] Questions abound here because, absent boots on the ground, the use of new technologies has generated many issues.

THE ENVIRONMENT OF COMBAT AND THE INDIVIDUAL SOLDIER

A man in military uniform generates a certain aura—the images and sentiments associated are so powerful that heads of state outside of Europe often choose to be photographed in their country's military attire even if some of them have never served in the army, let alone earned any of the medals they are wearing. Besides looking sleek and masculine, a military uniform almost automatically denotes service and sacrifice. Still, the face of actual battle, as opposed to the romantic depiction of it, has always been ugly, no matter what era. True, historically the battlefield has been considered the arena in which individuals can show off their prowess and earn fame and glory. Perhaps the fascination with war stems from its capacity to reveal human nature in its most extreme dimensions, from moral and heroic to demonic and savage. The lyric Greek and Roman poets tried to place a heroic cast on war, but the descriptions somewhat mask the grim reality of actual combat by cloaking graphic depictions of wounds and deaths in poetic language.[88] In contrast, Thucydides provides a grim realism that captures moments of weakness, the confusion and terror at the onset of battle, and the physical toll taken by hunger, thirst, and disease. The heroic image of chivalrous warfare celebrated in song and story belies the rather gruesome circumstances of the medieval mêlée for the ordinary infantryman. In World War I, the machine gun alone destroyed individual prowess as a virtue, although individual acts of heroism were still possible.

Although the impact of World War I ended most of the rhapsodic claims concerning the beneficent effects of war for men and nations, the romantic element still persists in celebration of the patriotic, heroic, self-sacrificing individual. In the preface to his study of American and British behavior in World War II, Paul Fussell, a veteran himself, wrote: "For the past fifty years the Allied war has been sanitized and romanticized almost beyond recognition by the sentimental, the loony patriotic, the ignorant, and the bloodthirsty."[89] As evidenced by contemporary story lines, many young men and women, perhaps influenced by action films and video games, have idealistically volunteered for service on all sides of conflicts in the Middle East only to die or become quickly disillusioned.[90] Despite the nightly news that often portrays graphic images, "distant violence becomes at once strange and familiar, intimate and remote, present and yet not really here."[91] The media, print, audio, or audiovisual filters out the true sounds, smells, and terrors for the distant observer. Familiarity breeds not contempt but a psychological distance that diminishes affect unless a personal reason exists for greater attention.

The Battlefield

An understanding of the circumstances that combatants must endure would seem an essential part of defining rules of conduct for battlefields. The following quote applies to all ages. Moreover, the importance of the observation stems from the fact that the laws of war place a personal obligation on combatants to act in appropriate fashion. Until the contemporary advent of international criminal law, only the law of warfare (now international humanitarian law) placed restrictions directly on individuals.[92] The reality of combat means that the infantry soldier, no matter what "age" we discuss, forms the central focus because

> of all combatants, the infantry soldier is the one who is subjected to the greatest degree to the sufferings of war. The fatigue of long marches and hard work, sleep

> deprivation, hunger, thirst, bad weather, heat as well as cold, the pain of injuries threaten to overwhelm him . . . He holds onto the objective steadfastly against all the enemy's power of destruction; he not only lives through a constant struggle against death; he also constantly witnesses the most horrible aspects of the battlefield, every day he sees the death of his leaders and dearest comrades around him.[93]

Descriptions of the deprivations endured by the army of Henry V prior to Agincourt (1415), and the wretched existence of troops in the trenches during World War I, yield vivid pictures of the very unromantic reality of war and combat. Starvation, disease, and lack of medical care, as much as engagement with the enemy, accounted for many deaths.[94] Over two-thirds of the 622,000 men who gave their lives in the Civil War died from disease, not from battle.[95] In the second Boer War (1899–1902), British forces counted 22,000 dead. Only 5,832 died in battle; the others died from wounds and disease.[96]

As the duration of combat conditions became more extended, psychiatric casualties became increasingly prevalent. After World War I, 65,000 British veterans drew pensions because they could no longer function in the civilian world.[97] The National Vietnam Veterans' Readjustment Study (NVVRS) originally concluded that 15 percent of Vietnam veterans had post-traumatic stress disorder (PTSD) at the time of the study (1988) and that 30 percent had suffered from PTSD at one time or another.[98] A reanalysis in 2003 found that "contrary to the initial analysis of the NVVRS data, a large majority of Vietnam Veterans struggled with chronic PTSD symptoms, with four out of five reporting recent symptoms when interviewed 20–25 years after Vietnam."[99] The rates of PTSD among those who have served in Iraq and Afghanistan has become a major topic of discussion.[100]

Machiavelli and Vegetius[101] both spoke of "fortune" (*fortuna*) in the sense of the unexpected—the unanticipated events that might determine an engagement. Uncertainty, the lack of any control over events and consequences, forms an element of war that applies across all ages. Many variables are not subject to control and management. Circumstance often plays a greater role than analysts or planners admit. Any student of military history will understand: Longstreet, without advance intelligence, fortuitously choosing to attack at a point that proved to be a gap in the Union line at Chickamauga (1863); Hitler's mistaken strategic and tactical decisions after D-day that missed an opportunity to contain and possibly compel the evacuation of the Allied invasion forces; or the fateful confusion of Japanese aircraft carrier commanders during the Battle of Midway that left them open to American attack.

At a different level, fortune for the infantryman comes from everyday survival. Maintaining motivation among the infantry represents one of the greater challenges of battlefield leadership.[102] Tactics might expose individuals to risk (we have to take that machine gun nest), but the fundamental uncertainty for the infantryman comes not from tactics but from facing the everyday risks inherent in the battlefield regardless of what they might know or precautions they might take. For the individual combatant, the constant everyday terror of the unknown exacts a price, physically and mentally. Combatants must live with the fact that their death could happen at any time from assault, ambush, artillery, snipers, roadside improvised explosive device (IED), or accident (even "friendly fire"), no matter what precautions they take. The knowledge that they exist as a tool or a part to be used by others in operations wherein the expectation is that a good many of the tools/parts will be destroyed by their use—and that their repeated use raises the probability of their eventual destruction—forms the fundamental reality of their existence. For the soldier in the field, rules matter considerably less than surviving each day.

In addition, recent U.S. wars have been "wars with no front" where "combatants" merge easily back into the general population, making it difficult to sort out fighters from the local "civilian" noncombatants, who might, in fact, have been guerrilla fighters. Wars occur amid the people rather than between identifiable sovereign blocs. Discerning the difference between the enemy and friendlies constitutes an ongoing stress. Enemy fighters can disappear or appear at any moment, or not at all. Low-intensity warfare increases the level of uncertainty and the stress caused by the unknown. In this environment, what rules could possibly apply that would not put the soldier in the field at a disadvantage? After all, if the opponent does not observe the rules, why should we?

CHAPTER 2

Historical Roots and Regulation

> War is a violent teacher.
>
> —Thucydides[1]

> War was good to think with in the ancient world. In other words, Greeks and Romans frequently used ideas connected to war to understand the world and their place in it. War was used to structure their thoughts on other topics, such as culture, gender and the individual. War was pervasive in classical thought.
>
> —Harry Sidebottom[2]

PERSPECTIVE

Historically, different societies have had very different ideas about the nature of wars and the role and obligations of those who fight them. To reiterate a theme developed in chapter 1, if rules about the waging of war exist, they have evolved from the circumstances that come from shared conceptions about the nature and role of war among or between participants. This axiom applies to rules concerning the initiation of war (*ius ad bellum*) and to rules about conduct in war (*ius in bello*). Because the definition of "war" depends on the organizational ethos of individual actors and the structure of the particular political environment in which they find themselves, a survey of the extremely diverse historical landscape yields only very broad patterns that have relevance for the discussion of contemporary practice. To forestall objections from those who find elements of natural law in contemporary human rights and humanitarian rules, many historical political environments have included religious and natural law elements. Understanding the history of attempts to control war requires considerable attention to the impact of natural law reasoning.[3] The diversity means that one cannot derive a definition of war that draws on archetypal elements that would permit generalization to all societies under all conditions throughout recorded history. While the past will provide examples where rules have evolved, the examples will be suggestive, not definitive. The journey to the contemporary era involves assembling a complex jigsaw puzzle that has poorly defined borders, irregular pieces, and a set of idiosyncratic individual pictures that may have only the faintest connection to each other. Nonetheless, one can still identify some very broad common characteristics that will provide guidance in identifying issues relevant for the contemporary era.

Another caveat is in order here as well. The narrative draws primarily on the evolution of Western ideas about war and regulation with occasional references to India, China, Japan, and Islamic law and practice. "Western" in this context refers to ideas that began in Greece and Rome, survived the collapse of the Roman Empire, took root in Northern Europe, then spread to the Americas and other areas during the age of European colonial expansion. The reason for the focus is straightforward—the principle philosophies and principles that form the basis for contemporary international humanitarian law come overwhelmingly from Western thought and practice.

Finally, to reiterate another point, the narrative uses rules rather than law because much of the discussion will involve informal, socially mandated practices, not formal legal requirements found in documents. To describe rules or practices as informal does not imply that participants could or would easily ignore them without some consequence. On the other side of the coin, just because rules have formal status does not ensure that participants will observe them. The fate of the restrictions on submarine warfare attacks on civilian population centers, and ill treatment of prisoners during the course of both World War I and World War II, clearly illustrate the fragility of formal rules when subjected to the pressures of survival and winning.

THE CHARACTERISTICS OF WAR AND OTHER CONUNDRUMS

For the moment, although his definition of war as "a continuation of politics by other means" is most often cited, Clausewitz offered another more suited to the purposes of this chapter: "War is a clash between major interests that is resolved by bloodshed."[4] Michael Howard defines war as "a great socio-political activity, distinguished from all other activities by the reciprocal and legitimized use of purposeful violence to attain political objectives."[5] The two definitions will suffice for the journey through history because they capture important features that help set the stage for the contemporary era. First, they suggest that war has had many different purposes that change over time, even though, until the gunpowder revolution in relatively recent history, the methods and means remained somewhat static. Second, they emphasize that war is an organized collective enterprise, a struggle *between peoples as groups* rather than between private individuals. David Bederman adds a third element, noting that "there is . . . no doubt that in antiquity, war was considered to be the unique prerogative of the state, a social phenomenon of legitimized violence between polities."[6] Bederman argues that for many polities in antiquity, religious rituals associated with the decision to go to war served the function of legal justifications.[7] To emphasize a point made in the introductory comments in this chapter, the significance of these criteria stems from an explicit recognition that an important transition in status occurs with the decision to undertake hostilities against another entity.[8]

Greece

Josiah Ober notes that during the era when rules of engagement in intra-Greek warfare are most evident, from the eighth to mid-fifth century BC, Greek city-states lacked any institutions that might have had the authority to establish formal "international" rules, and little evidence exists concerning other instruments, such as sworn covenants, that might have formed a secondary source of common rules.[9] Nonetheless, evidence assembled by W. Kendrick Pritchett[10] and Victor Hanson[11] supports the idea that the Greek states did generally follow an unwritten set of common customs with regard to warfare.[12] Ober lists 12 informal rules of engagement. These include a formal declaration of war, recognition of truces and the inviolability of certain shrines and sacred places, the return of enemy dead, a ritual of challenge and acceptance of battle, good treatment and ransom of prisoners of war, noncombatant immunity, and restrictions on types of arms used in battle.[13] Other rules apart from those particular to warfare, such as the immunity of heralds (messengers) and envoys, applied as well.[14] The rules of engagement flowed from the particular characteristics of hoplite warfare, which in turn reflected some important social realities of most Greek city-states. However basic, undeveloped, and poorly observed, until the Second Peloponnesian War, the rules did have the effect of shielding noncombatants from active conflict.

The hoplites that formed the phalanx, the central formation used by Greek polities, were primarily farmers, who formed the economic backbone of most Greek city-states. This had three important impacts. First, economic necessity meant that soldiers could not be long away from tending to their farms. Hanson says, "The harvest demands of the triad of Greek agriculture—the olive, the vine, and grain—left only a brief month or two in which these small farmers could find time to fight."[15] Second, wars did not involve multiple battles but normally consisted of a single clash, lasting perhaps little more than an hour. Third, while bloody, wars resulted in relatively few casualties when measured by modern standards. Repeated encounters would have quickly depleted the available manpower of most Greek city-states. Corinth and Thebes for example, with 10,000 inhabitants, were two of the larger polities.[16]

Relying on Thucydides, Ober argues that after 450 BC, the rules began to break down: executions of enemy ambassadors, prisoners of war, seamen, and allied troops occurred, and enemy social and economic systems became targets for destabilization. By the late fifth century, as states abandoned citizen forces for mercenary troops, and hoplite warfare transformed in some important ways, the "general structure of war by the rules was shattered . . . and never effectively reconstructed thereafter."[17] The reasons for the decline and demise are instructive for all ages. By the mid-fifth century, Athens had accumulated considerable wealth, permitting it to ignore the traditional rules. When a Spartan army arrived in Attica in 431 BC, the Athenians refused to meet the challenge to battle. After the Spartans left, Athens retaliated against Megara, an ally of Sparta. Violating custom, they sent an army to lay waste to Megara's modest agricultural base.[18]

Athens had some previous provocation for its actions. In 432 BC, the Megarians had murdered an Athenian herald. Pericles, the "first citizen" of Athens, had advocated and pushed a measure through the Assembly (*Ecclesia*), known as the Megarian Decree, that imposed a regime similar to a modern trade embargo. Although a tactic used by polities in the ancient Near East, embargoes had never been part of the Hellenic arsenal of reprisals. Athens also announced that the war would be "heraldless" or "truceless"—meaning no negotiation and implying that the traditional rules of engagement would not apply.[19]

Unfortunately, a devastating plague hit Athens in 430 BC. The extent of the death toll caused a total breakdown in Athenian society. Thucydides graphically describes the social consequences of the epidemic. The plague completely destroyed the communal fabric of Athenian society. People ceased fearing the law and behaving honorably because they felt they were already living under a death sentence and did not expect to live long enough to care about a good reputation.[20] With restraints lacking, Athenian generals turned to a strategy of social disruption. The result of abandoning custom proves instructive. The Spartans, in response, also abandoned the traditional rules of engagement and proved very adept at devising strategies of social subversion and economic coercion. Ober observes that in the end the Athenians lost because the Spartans expanded the theater of operations and their own resource base, which permitted them to attack and choke off the Athenian grain lifeline from the Black Sea. He asserts that abandoning the rules had a long-term deleterious impact on Hellenic society in that war now undermined rather than supported the existing social order.[21] *Straightforwardly, derogation from accepted norms may provide a short-term advantage, but one should also remember that the enemy has the same option.*

Rome

In principle, Rome considered itself permanently at war with any state with which it did not have a treaty of friendship or alliance (*foedus*).[22] Bederman argues that the state system of the ancient Near East and the Mediterranean world of the third and second centuries BC was multipolar and "explicitly premised on balance of power notions."[23] This precluded any thoughts about peaceful coexistence, particularly because Roman expansionist goals posed a continual threat to the balance of power. The second Punic War (218–201 BC) and its aftermath firmly established Rome as the supreme power in the Mediterranean. Relationships with other states were now based on Roman dominance.[24]

Roman writers often compare their fidelity to the "laws of war" with the bad behavior and outright treachery of their enemies. For example, in their dealings with Carthage, Roman writers always portrayed Carthaginians as artless, heartless, and untrustworthy. Livy spoke disparagingly of *punica fides*, which for the Romans represented the utmost degree of bad faith, treachery, and perfidy.[25] Cicero claimed that there are certain laws of warfare that must be strictly observed.[26] Polybius also speaks of the laws of war as the "common law of mankind" and the "well settled rules of human right."[27] He gives some insight into Roman thinking about war:

> For it is one thing to seize on and destroy the enemy's forts, harbours, cities, men, ships, crops and other things of a like nature, by depriving him of which we weaken him, while strengthening our own resources and furthering our plans: all these indeed are measures forced on us by the usages and laws of war. But to do wanton damage to temples, statues and all such works with absolutely no prospect of any resulting advantage in the war to our own cause or detriment to that of the enemy must be characterized as the work of a frenzied mind at the height of its fury. For good men should not make war on wrong-doers with the object of destroying and exterminating them, but with that of correcting and reforming their errors, nor should they involve the guiltless in the fate of the guilty, but rather extend to those whom they think guilty the mercy and deliverance they offer to the innocent.[28]

Cicero stated that "there is a limit to retribution and punishment; or rather . . . it is sufficient that the aggressor should be brought to repent of his wrong-doing in order that he not repeat the offence and that others may be deterred from doing wrong."[29] He argued that "the only excuse, therefore, for going to war is so that we may live in peace unharmed."[30] This rather open-ended statement permits war to be waged for breaches of faith or to keep one's own *fides*, or to ensure the safety (*salus*, health) of the state. Harry Sidebottom interprets this to mean that any injury to Rome or its allies, or even the perception of a hostile power that could threaten its *health*, could form a valid or "just" reason for war.[31]

As with the Greeks, some rules stemmed directly from religious practice. Sacred places and individuals associated with them should enjoy inviolability and immunity. The statement by Polybius concerning "wanton destruction" indicates that more pragmatic concerns played a role as well. Against barbarians, the rules of war permitted the pillaging of villages, execution of certain prisoners, and enslavement of the inhabitants.[32] Women were considered free game for taking as slaves and/or sexual exploitation. A distinction between combatants and noncombatants did not exist—in fact, classical Latin does not have a word that embodies the notion of "civilian."[33]

JUST WAR IN GREEK AND ROMAN THOUGHT: THOUGHTS ON THE *IUS AD BELLUM*

One of the more influential streams of thought in Western discourse occurred with the connection of war with the idea of justice—that war should be used to subdue evil and promote good. The idea of just and unjust wars formed common currency in Greek political discourse, but the exact elements that made a war just or unjust remained relatively undefined. For Plato, wars between Greeks and barbarians were natural, while those between Greeks needed justification. Yet, on the other hand, the causes of war did not form a topic of extensive discussion, indicating that justification required little in the way of analysis. Fear (security), honor, and interest formed simple and understandable motivations. A war initiated when an enemy has done no wrong would be unjust, but the wrong committed would not have to be a real or potential attack. Wars did not have to stem from the necessity of self-defense.[34] Deceit, as a wrong, could form a valid reason.

While the Greeks did not develop a set of criteria that defined a just war, the stoic philosophers (third century BC) systematically developed the concept of *natural law* (*ius naturale*)—a set of universal norms that would apply to all humankind at all times.[35] Aristotle had postulated the idea of a body of laws that everywhere has the same force and does not exist by individual opinion.[36] Natural law comprises those general laws of nature that apply to all peoples. The idea of a common natural law still infuses contemporary thought about human rights.

Much has been written about the formal requirements used by Rome for justifying war. These originated in religious practice but evolved over time into a secular formality. They are worth reproducing because of the impact on future discussions about justice and war.[37] Apart from the religious ritual, Cicero remarks: "No war is just unless it is entered upon after an official demand for satisfaction has been submitted or warning has been given, and a formal declaration made."[38] In practice, these requirements did not constitute a restraint on Roman ambitions.

Late Antiquity[39]

Brent Shaw argues that a great deal of the violence in late antiquity did not consist of one army fighting another but of attacks explicitly aimed at terrorizing civilian populations.[40] In particular, the Byzantine reconquest of North Africa, and Roman actions along the Rhine and Danube, consisted largely of deliberate massacres of unarmed rural villagers. The conquest of Italy by the Ostrogoths during the late fifth century AD resulted in the eradication of almost all traces of Hunnic culture in Italy.[41] Over the long term, the idea of war as a means of serving state interests existed only in the sense of having to deal with continual border threats because much flowed from ad hoc decisions by commanders in the field far from possible direction by central authority. Long reigns produced consistent policy, short reigns military instability: "The close connection between war and political power put constant pressure on monarchs to direct war in person on the field of battle . . . Thus the advent of each new ruler tended to provoke a perceived need to challenge the status quo."[42] Much of the fear concerning tenure came from internal, not external, challenges. Shaw concludes that at least one-third of the fourth century AD was consumed by internal wars, one part of the Roman state against another.[43] In his study of the Byzantine Empire, Warren Treadgold states, "In the chaotic period between 695 and 717 [AD], the army repeatedly made and unmade emperors."[44]

War became a way of strengthening one's credentials as king. Yet, finance formed a formidable constraint. Lacking private financial institutions with the surplus resources to gamble, the funding of war relied on exaction of tribute, war booty, and outright seizures of property and stored wealth. Shaw states that "sometimes costs could be recouped during the political purges that followed bouts of civil war, but the usual compulsion was to find another war whose booty would pay for the one just waged."[45] Michael Grant argues that the "crushing burden" of taxation necessary to maintain the frontier against the Germans formed a major reason for the fall of the western empire.[46] Treadgold asserts that military expenditures for the late Roman and Byzantine states consumed three-quarters of the total state budget.[47] Needless to say, questions of justifying war did not form a major concern.

The Rise of Islam

The entry of Islam into the Mediterranean mix in the seventh century AD presented a new challenge to the West. Like its traditional Western counterpart, Islam divides legal relationships into rules governing times of peace and rules governing relationships during war.[48] Peacetime relationships were based on human brotherhood, protection of rights, a commitment to the rules of ethics and morality (the "pillars of civilization"), justice, international cooperation, the sanctity of covenants, and reciprocity.[49]

However, the roots of the law do not flow from mutual consent or reciprocity. They are directly derived from the Qu'ran and the Hadith.[50] The questions stem from asking, to whom does the law apply? Writing about the relationship of Islamic law to Western thought, Majid Khadduri notes that "Islam recognizes no other nation than its own. Similar to the law of ancient Rome and the law of medieval Christendom, the law of Islam was based on the theory of a universal state . . . one community, bound by one law and governed ultimately by one ruler."[51]

Reflecting this perspective, the world becomes divided into lands of the converted (*dar al-Islam*) and everyone else (*da al-harab*—people of the war). Some scholars have suggested a third category, *dar al-`ahd* (or *dar as-sulh*)—the abode of covenant.[52] Those in the abode of covenant are non-Muslims who live in Islamic territory according to a covenant: "The abode of war comprises countries which are outside the scope of Islamic sovereignty and where the religion and political rules of Islam are not implemented; its people are belligerents."[53] In the traditional law, those in the *dar al-Islam* had a legal duty to bring all others into the fold (*jihad* equals the just war, *bellum justum*, of the West). From an Islamic legal standpoint, it is a permanent state of war.[54] In theory, war is justified only to resist aggression against Muslims, to ward off injustice, and redress injury, and in self-defense, not for purposes of conversion. Sheikh Wahbeh Al-Zuhili argues: "Before the declaration of either war or *jihad*, the enemy should be made to choose one of three options: Islam, as a token of peacefulness; reconciliation or a peace treaty with Muslims; or finally war."[55]

Dilemmas of Faith: Reconciling Christian Values and Violence

As Christianity spread, there arose a need to reconcile the pacifism of the Gospels with the demands of the state and the perception that war formed an inevitable, necessary, and ongoing part of human existence on earth. From the beginning, the issue had two dimensions: personal and collective. Could good Christians serve in the military? If not, could they accept the protection of others? Over time, pragmatism overrode purity. Defense of the community and the faith came to be identified with justice. One could use force to punish wrongdoers. Saint Augustine wrote: "It is the injustice of the opposing side that lays on the wise man the duty of waging wars."[56] Augustine advanced four principles that continue to frame discussions about the morality of war: just cause (defense or right redress/recovery), legitimate authority, right intention, and beneficial outcome.

Chivalry: Rules, Romance, and Reality

Although the development of feudalism did not take hold in every part of Europe or with equal effect, in those areas where it did have an impact, the idea that "all politics were local" still applied across the board. The emphasis on personal allegiance had important implications for the law of war. The noble fighter was considered to be engaged in a Christian profession, not in the performance of a public service in the modern sense. During the 11th century, as techniques of warfare increasingly emphasized heavily armored cavalry, a social order emerged that emphasized the special role, duties, and prerogatives of a noble class. In turn, a set of practices based on expectations about knightly behavior (chivalry) evolved as manorial structures became permanent fixtures. The new social structure drew a very well-defined line between the privileges of the permanently armed nobility, the armored horsemen, and the vulgar herd who would serve as ordinary foot soldiers.[57]

The provisions of the "chivalric code"[58] defined rights and obligations for the knightly class based on duty, honor, and piety. The corpus of practice dealt more with protecting the individual rights of the privileged knightly class than with regulating the conduct of troops of warring nations. A knight fought at his own risk as an individual—rights or sanctions applied to him personally, not collectively to the side for which he fought.[59] A knight supported his own retinue, and if captured, negotiated his own ransom and release. Knights fought because of honor, service to a liege lord, or because the booty from a war might provide a handsome profit. Contamine emphasizes this, observing that "during a given battle, gentlemen were careful to avoid surrendering to 'commoners' . . . because they expected no mercy from them; it is hardly necessary to say that the opposite was also true."[60] By the laws of war, common soldiers could not hold prisoners for ransom, nor did they have value themselves as prisoners, so giving quarter offered no profit or advantage. Swiss pikemen and Flemish militia became notorious for not taking prisoners.[61] The norms also applied only to Christian knights.[62] For knights, loyalty to one's liege lord—and for mercenaries in the absence of other claims, to one's captain—took precedence over fealty to king or prince. In particular, the native allegiance of a knight had great importance even when fighting in someone else's service because his liege lord controlled the knight's lands and fortune. The complex web of obligation could place the individual at great disadvantage if his captors did not share his interpretation of his duties.[63]

Indeed, the stakes of war for an individual noble or knight were considerable: the possible confiscation or devastation of his lands, or perhaps worse, his capture for ransom. The possibility of having to pay ransom offset the possibility of accumulating greater wealth. The obligation to pay constituted a normal, legally enforceable obligation for debt. Since captors often calculated the figure of the ransom on a rather commodious impression of the prisoner's ability to pay, the potential possibility of capture, rather than death, formed the greatest concern among all levels of the nobility.[64]

Despite the rules of chivalry and theorists advocating noncombatant immunity, the *ius in bello* remained largely an area considered beyond regulation. The code of chivalry applied only to those bearing heraldic insignia, primarily knights and squires. In keeping with the strictures of the Peace of God, agricultural workers, women, children, the elderly, and the clergy should be exempt from looting and pillaging. Robert Stacey notes: "In practice, however, neither soldiers nor the lawyers and judges who adjudicated the resulting disputes over plunder paid the slightest attention to such immunities."[65] What little commentary existed tended to be exculpatory in the sense of justifying almost any action sanctioned by a recognized authority. Raids, looting, and ill-treatment of civilians was seen as an unfortunate but natural element of war. Siege warfare had its own rules. If a city surrendered without fighting, the property and lives of its inhabitants would be spared, but those who surrendered could be considered as committing treason by the superior authorities to whom the inhabitants owed allegiance. If the city did not surrender but engaged in active defense, if taken, the besieging forces did not have to give any quarter. The lives of all inhabitants and their property were potentially forfeit.[66]

In 1366, Pope Urban V did excommunicate and anathematize the members of all free companies then operating in Italy. Less than a decade later (1375), Pope Gregory XI nullified the action and actively recruited mercenaries, among them John Hawkwood, to quell a rebellion against papal authority.[67] On the direct orders of papal officials, Hawkwood carried out a massacre of the citizens of Faenza and Cesena, which, according to many accounts, he found personally distasteful. Soon after he left papal service to spend most of the rest of his career bound to Florence.

CIVIL LAW, CANON LAW, AND JUST WAR

Robert Stacey argues that by the ninth century, most ecclesiastical writers had embraced war. When they did make attempts to preach restraint, it had more to do with violence or warfare within the Christian realm than restraint as a general good.[68] The first half of the 12th century witnessed the rebirth of active legal and theological scholarship. Three distinct streams of thought emerged: scholastic theology, the development of canon law based on the exegesis of papal *Decretals*, and the revival of the Roman civil law (*ius gentium*), each with its own distinct method of reflection and analysis. All three enterprises faced the same problems in terms of mitigating the harsh impact of war. The structure of authority, the idealism of the ethic of chivalry, and the insatiable and contentious attitude of medieval knights made a frontal attack on warfare impractical. Stacey describes the Catholic Church's promotion of the First Crusade as a "counsel of despair" because of its inability otherwise to restrain and redirect warfare away from Christian targets.[69] Theologian, canonist, and civil lawyer alike had the choice of being pure or being relevant. No person of influence, including the pope and Holy Roman emperor, had both the means and authority to impose consistent, meaningful, and effective sanctions for violation of any of the codes.

The papacy, from the time of Pope Urban II (1088–1099), lent its institutional weight to efforts to establish peace. The church promulgated both the Peace of God (*Pax Dei*) and the Truce of God (*Treuga Dei*) in an effort to limit the resort to force. The Peace of God was important as a precursor to the Truce of God, which sought to limit the number of days of warfare. The Peace of God also contributed to the evolution of a sacred militancy as an attempt to channel and shape the resort to force as a defense of the faith. This effort prepared the way for the Crusades.[70] Although not itself a major success, the Peace of God contributed to the reestablishment of order in society in the 11th century, helped to spread recognition of the need to aid the poor and defenseless, and set the foundations for modern European peace movements. As noted earlier, as long as feudalism remained the structure that determined who held political power, those individuals inherently opposed efforts based on the principle and practice of private peace because it did not serve their interest. The Truce of God was most influential in the 12th century, but in the 13th, its sway waned as kings gradually gained control over nobles and substituted the guarantees of a king's peace for that of the church.

All three traditions interpreted natural law, biblical authority, and Roman law as freely licensing those forms of war that involved defense of the faith and of the self.[71] Quarrels among Christian princes over more mundane matters posed a more formidable set of issues. From Augustine onward, the irrefutable first principle held that, in the absence of authorities who could provide effective redress for wrongs, the end products of war—peace and justice—justified the means. While individuals could, and often did, abuse their ability to make war by using it for evil purposes, resort to war was not considered an evil when employed in the service of justice. The destruction and displacement resulting from war, a burden most often borne by noncombatants, were considered regrettable but regarded as unavoidable side effects from an otherwise necessary and beneficial undertaking.[72] Thomas Aquinas stands as perhaps the single most influential theologian in terms of articulating the conditions for just war in defense of the common good.

Differentiating between necessary and beneficial exercises of war and those that lacked appropriate cause involved two interrelated problems: developing criteria to separate cases of justifiable war from other forms of violence and distinguishing formal states of war from peace. Neither endeavor constituted an easy task in a milieu where violence formed an integral part of the fabric of everyday life. It was entirely possible to have clashes that involved pitched battles during an official time of peace, and war did not necessarily mean an exceptional period of intense hostility between sovereigns.

By the 14th century, scholars had developed and agreed on seven types of war. The categories do not represent an idle intellectual exercise because war sanctioned by just cause altered the effect of the civil law (*ius gentium*) in important ways. These seven patterns reflect real situations and include all genres of conflict possible in the constantly evolving medieval context. Four are licit, three illicit:[73]

1. Roman war: defense of the faith against the infidel (*guerre mortelle—ius in bello* did not apply)
2. Judicial war: to impose judicial order on rebels or others who resist legitimate authority
3. Presumptuous war: fought by rebels against lawful judicial authority (unjust)
4. Licit war waged by legitimate authority to redress wrongs
5. Illicit war waged by those resisting the redress of a wrong (unjust)
6. Private (willful) war waged by secular powers without legitimate authority (unjust)
7. Self-defense: war waged in response to private (willful) war

From a moral and juridical standpoint, taking life or property without just cause was iniquitous. For the professional soldier, just war legitimated acts otherwise regarded as crimes. In an era when standing armies did not exist, the soldier's livelihood depended on making war pay because even when in service his pay was neither adequate nor regular. The moment the state of war came to an end, so did the legal right to plunder, pillage, and take prisoners and areas to hold for ransom. The professional always looked for a legal reason to remain in arms. In the period between the treaties of Bretigny (1360) and Westphalia (1648), the search for an appropriate billet was seldom long or difficult. For example, in the 10 years following the peace of Bretigny (1360), a mercenary soldier would have had a choice of three major wars in France, employment in Italy, countless other minor conflicts, plus the possibility of joining one of the freelance companies still ravaging the countryside relatively unchecked.[74] Acute social and political rivalries, weak economies, and falling demographic trends contributed to a vicious cycle: war exacerbated these conditions, and the dislocations from war engendered new tensions and more wars. Citizen militias declined in importance in part because the increased complexity of warfare demanded much more in the way of training and command skill than was possible with part-time amateurs, and in part because militias could not undertake the lengthy campaigns or garrison duty necessitated by the political environment without substantial economic dislocation and social unrest.

One of the interesting unintended consequences associated with the development of these categories was their use by secular monarchs to constrain the resort to private war. The clergy had consistently opposed the use of violence as a means of settling petty disputes, but private wars were deeply rooted in the customs and usages of the times. During the Hundred Years' War, the kings of England and France attempted to proscribe all acts of private defiance while at war. While not fully effective, the action marked an important step in the evolution of modern conceptions of the role of the state. By the 16th century, scholars writing about just war put the right of the prince to mete out vindicative justice at the center of their arguments. Just war and public war had become almost synonymous.[75] Unless employed by a prince in a public war, the activities of the free companies and other bands now fell outside the strictures of the law. Unless the product of a just war, ransom agreements and other obligations presumably had no legal merit and could not be enforced through the courts.[76]

The idea that only princes—that is, those with no secular superior—had the right to declare war (because war suspended the normal operation of the civil law) clashed with the older feudal doctrine that entitled any person of noble birth to wage war in defense of his rights. In the absence of an effective authority with established procedures to settle controversies as a relatively disinterested third party, the notion of justice had become assimilated to that of legality. War, then, had assumed the role of an extraordinary form of litigation. Russell highlights the irony: "What with Augustine had started out as a problem of morality and scriptural exegesis ended up as a tool of statecraft in the hands of secular monarchs."[77] The assertion that the exclusive right to wage war belonged only to those with supreme authority carried with it an important consequence: *the claim of a public interest that overrode all claims to private enforcement of private rights*.

SECULAR JUST WAR THEORIES TO WESTPHALIA

Chivalry reflected the expectations associated with feudal society. Changes in socioeconomic patterns undermined the rationales that formed the foundations of feudalism by facilitating the consolidation and centralization of political authority. The change in authority structures, in turn, produced substantial changes in the composition of armies and battlefield tactics that diminished the value of heavily armored cavalry. Two other factors—the violent schism in Christianity triggered by the advent of Protestantism and the increasing use of gunpowder weapons that diminished the possibilities for individual feats of valor on the battlefield—served to make most of the old rules of warfare irrelevant.

The secular just war tradition, based on natural law rather than transcendental sanction, emerged during the latter part of the 16th century, marking an important transition in the evolution of modern international law. The predecessors to Grotius began to distinguish between subjects and others even though a large proportion of the great armies of the period consisted of nonsubjects serving for pay. While in some cases we can speak of a nascent national identity after the Hundred Years' War (1337–1453), with respect to the major players on the European continent, we cannot speak of nationality in any meaningful sense in terms of military obligation, nor can we speak of any general expectations of loyalty to sovereigns or causes much beyond that created by pay and personal allegiance.

True, as the power of the idea of a universal Christian unity waned, the secular forces promoting the emergence of particularistic identities grew stronger. The rivalry between the Habsburg and Valois dynasties, placed in tandem with a papacy that lacked both the spiritual authority and the political means to effect a reconciliation between the two leading Catholic powers, thoroughly undercut any movement toward rebuilding a unified Catholic authority. With the rise of Protestantism, the fundamental schism within Christianity itself finally ended whatever influence the ideology of unity still exerted, while at the same time the split hindered the emergence of widespread feelings of national solidarity within areas as the movement spread. National identity often masked the weakness and relative impotence of the associated central authority. Germany consisted of an odd array of cities and principalities ostensibly subordinate to the Hapsburg emperor.[78] The territories associated with France were a loose association of lands formally subject to the Valois kings.[79] Areas could have their political allegiance quickly changed by a transfer of sovereignty resulting from cession, inheritance, or conquest.

To illustrate the situation in the mid-16th century, the Holy Roman emperor had to employ armies to thwart the ambitions of French kings, to repel the Turks, and to defend his holdings in Spain, Italy, and Flanders. Thousands of German mercenaries (*landsknects*), nominally subjects of the Holy Roman emperor, fought against Hapsburg armies. It was still the king of England or the king of France or the Holy Roman emperor who required an army, not yet the English, French, or German state. Through the Thirty Years' War, monarchs still often depended on military contractors. If not for Wallenstein and Tilly, the emperor Ferdinand would not have had an army.[80] Obligations, such as they were, fell on soldiers as individuals. Views differed as to how onerous those obligations might be, particularly with respect to an individual's duty to inquire into, and make a personal judgment about, the nature of the cause before committing to any side in a conflict.

The 16th- and early-17th-century writers considered to be the precursors to Grotius focused on clarifying the circumstances covered by the *ius ad bellum* with an eye toward strengthening and expanding the *ius in bello*. Legal theory had not yet shed the *a priori* principle that the right of princes to resort to arms and, in consequence, that of combatants to be protected by the provisions of the *ius in bello*, still turned on the determination of just cause based on fault. In the absence of vindicative grounds for the resort to violence, the vast majority of writers continued to argue that neither the combatants nor the results had any standing in law. As always, these writers struggled with the nexus between idealism and practice, often bowing to the conclusion that a conclusive determination of justice may fall beyond the power of men to ascertain objectively ("invincible ignorance"). If so, then the duty falls on princes to minimize damage to the innocent. The twin principles of proportionality—that of effect and that of value—should limit claims to military necessity.[81] If armies had followed these strictures to the letter, war would have become unprofitable for the individual soldier.

Francisco de Vitoria (1492–1546) put forth two simple propositions that, at first glance, do not depart in any meaningful sense from mainstream classical medieval formulations of individual obligation. The first limits the initiation of just wars to public authorities in those entities that meet the criteria to be a "perfect state or community," that is, "one which is complete in itself . . . not a part of another community." Second, "if it is evident that the war is unjust . . . or if the subjects are conscious that the war is unjust, they may not fight, even when the prince exercises compulsion upon them. The reason for this is that such a prince is committing a mortal sin, and one must obey God rather than him."[82] The second raises an issue still widely debated by contemporary philosophers and lawyers—*does the status of individual soldiers depend on whether a war is just or unjust?* For the individual itinerant soldier, he states: "I also maintain that those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay and who are, moreover, not subjects, commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing."[83]

The individual soldier's task thus became more difficult because Vitoria narrowed the range of just causes to "wrongs received" defined in terms of natural rights. On its face, this proposition would seem to place an enormous burden on the individual soldier. In practice, the idea of simultaneous ostensible justice based on "invincible ignorance" ameliorated the requirement. The key consideration derives from the qualifying phrase "if it is evident." Because of invincible ignorance, both sides in a given conflict may fervently believe they have just cause. In such cases, according to Vitoria, only God can know objectively which antagonist actually has right on its side.[84] The individual soldier may thus rely on the judgment of the prince and his advisers based on their collective consciences. Nonetheless, the remarkable and radical aspect of Vitoria's argument flows from his insistence that subjects have an *individual* moral responsibility to avoid fighting in an unjust war because participation would expose their immortal souls to far greater peril than disobedience to the secular authority of the prince.[85]

Three generations later, Francisco Suárez (1548–1617) developed the rationale further, placing the prince and an embryonic formulation of *raison d'être* at the heart of his argument. The general direction of his reasoning largely removes the moral burden from the individual except in the case of positive doubt. Still, the lack of attention Suárez apportioned to the discussion of circumstances under which positive doubt might play a dominant role suggests that he considered such occasions would be rare and self-evident.[86] Suárez did address the possibility that a war might be simultaneously unjust on both sides. At this point, his argument blends theology with natural law. By drawing a distinction between nature and charity, he concludes that such a war would violate the canons of charity but not necessarily those of justice. Harking back to earlier views concerning the role of war, he asserts the hostilities would represent a tacit agreement by the parties to decide the issues between them by a test of arms.[87] Still, Suárez gives an interesting twist to the classical position by claiming the contest would conform to the laws of nature but not those of God. Because ordinary men might not have either the capacity to understand or sufficient knowledge to make discriminating judgments, the primary responsibility would now rest with the conscience of the prince.

Grotius (Hugo de Groot)

The work of Grotius (1583–1645) stands as the first extensive treatment of international law that attempted to develop a systematic jurisprudence. Modern analysts accept Grotius as the father of international law.[88] In discussing the nature of the traditional *ius gentium*, Grotius went to considerable lengths to explain that in his opinion it represented natural law as well as a body of rules, human and volitional (i.e., not divine in origin), deliberately created by human beings to serve human needs. Perhaps the best measure of his influence over the next hundred years or so comes from Adam Smith, who noted in 1762 that "Grotius seems to have been the first who attempted to give the world anything like a regular system of natural jurisprudence, and his treatise *De Jure Belli ac Pacis* (*On the Laws of War and Peace*), with all of its imperfections, is perhaps at this day the most complete work on the subject."[89]

In developing his thesis on the laws pertaining to warfare, Grotius leaned heavily on the scholastic writers, with frequent citations from the works of Vitoria. His innovative approach moved discussions about war forward in a number of ways. Virtually all forerunners of Grotius had limited their learned discussions of war, both just and unjust, to the beginning of a conflict. One can clearly see the impact of events during the Thirty Years' War (1618–1648) on his thinking. By including detailed discussions of actual military operations and their potential legal consequences, he opened a vast new area for speculation and debate. With insight and a persuasive use of past examples, he urged moderation in warfare. Topics included the status and fate of hostages, destruction of property, the problem of how one should deal with the religious beliefs of the defeated, and a host of other questions ignored or sidestepped by his predecessors. Grotius himself did not believe that this particular portion of the *Law of War and Peace* represented a collection of legally binding principles. Rather, he saw his discussion of the conduct of hostilities as a form of pragmatic personal advice to statesmen and military commanders of his age

A novel aspect associated with the concept of lawful or just war advanced by Grotius involves the question of war as a punitive measure. Earlier writers had maintained that only "superiors" were entitled to inflict punishment. Grotius, on the other hand, believed that equals could also inflict penalties or sanctions. He regarded war as a punitive action aimed against state crimes, analogous to the domestic punishment of crimes committed by individuals.[90] Sovereigns could thus lawfully exact punishment not only for injuries sustained by them or their subjects but also against any person whatsoever if the injurious acts constituted a violation of the law of nature or international law. This right of punishment originated in the law of nature, according to Grotius. The modern reader will find in the relevant pages of Grotius strong echoes of the demands for the punishment of war criminals voiced during World War II. Book II, chapter 21 contains a striking passage that argues that *subjects will make themselves responsible for crimes of their sovereign if they consented or acted illegally under his persuasion or command.* In effect, Grotius made the first argument that denied that a defense of "superior orders" could serve as a justification to escape punishment for war crimes.

The distinction made by Grotius between a natural law of nations and the customary or voluntary positive law, developed by earlier writers,[91] led to the rise of three separate schools of legal philosophy in the 17th and 18th centuries: the naturalists, the positivists, and the Grotians. The naturalists, led by Samuel Pufendorf (1632–1694), denied that any positive law of nations originated from custom or treaties. Naturalists, drawing on Thomas Hobbes (1588–1679), argued that international law merely formed a part of the law of nature. The positivists, in turn, opposed the followers of Pufendorf in believing that a positive law of nations had its true origin in custom and treaties, hence in the *consent of states*—that is, the actions of human beings. They argued that this law was far more important than any natural law of nations. Some writers of this school went so far as to deny the very existence of a law of nature. The leading positivist was the Dutch jurist Cornelius van Bynkershoek.[92] The Grotians held to a middle position in the controversy, asserting that Grotius himself had drawn tenable distinctions between natural and voluntary law. But many of his disciples differed from the founder in insisting that both kinds of law were equally important. Since the 17th century, the trend has moved away from the naturalists and strongly toward the position of the positivists, although contemporary discussions of human rights seemingly have returned to a modern secular version of natural law reasoning.

The idea that an international society, a community among nations, exists that has rules to govern its conduct, however derived, flows from Grotius. Followers of the Grotian tradition acknowledge the harsh realities sovereign states may face while emphasizing the common interests (interdependence) they share. Political realism emphasizes the obstacles; idealism and liberalism focus on common interests. Grotius attempted to develop a middle way, wedding the idea of natural law to positivism—idealism with realism—what should be to what is factual practice. The Grotian tradition underlies the general analytical approach of the contemporary "English school" of analysis in international relations.[93]

THE IMPACT OF WESTPHALIA (1648)[94]

Textbooks and international relations literature routinely refer to the Westphalian state system, but to understand the evolution of international law, one must understand what the agreement at Westphalia did and did not do. One school of thought sees the immediate emergence of an international "society" based on reciprocal obligations. The treaties did contain some language that established, in principle, the twin ideas of sovereign independence and equality (i.e., all states regardless of size or religious persuasion had the protection of the law such as it was), some rudimentary requirements for the pacific settlement of disputes, and the possibility of collective action against any state violating the treaty. In addition, the collective grant of recognition to the Swiss Confederation and the United Provinces (Netherlands) as independent sovereign states and the rhetoric contained in some treaty instruments do provide some idea of a nascent "club" with formal rules for admission. For many, publicists aside, Westphalia marks the political beginning point of modern international law because of the "deliberate enactment of common regulation by concerted action."[95]

This comment considerably overplays the political reality of the prior 100 years as well that of the next 150. While we take treaties ending major conflicts as convenient historical markers, they usually merely register, in static form (i.e., as a snapshot rather than as a dynamic moving picture), trends already well under way but perhaps not yet fully developed. Westphalia marks the final transition point between the old *hierarchical* feudal order based on a network of complex personal relationships, loyalties, and obligations and the modern *horizontal* order based on the idea of independent, self-governing (*sovereign*) states that recognize no superior political authority. When the signatories accepted the settlement at Westphalia, they entered a totally uncharted realm. The treaties certainly heralded the absolute end of the old personal and hierarchical order but did not produce a system of authoritative rules to govern the new circumstances of "anarchical freedom." *It is one thing to destroy the old; it is entirely a different enterprise to put something new in its place that satisfies all. Westphalia did not produce a binding set of obligations to govern future relations.* These evolved slowly over the next two centuries.

At this point, an idea of Europe as a collective set of states with a distinctive common heritage of law and civilization had evolved—a rudimentary society existed, bound together by close common links among the Great Powers.[96] Over the next 150 years, while war continuously pitted European states against each other, the idea also grew that Europe formed an organic society of states bound together by common ties of family relationship, religion, and historical tradition that set Europe apart as "civilized." While fighting each other, the states also engaged in a competition for empire overseas. Wars might occur in Europe, but presumably the connections (and the resolution) were more significant than the sporadic outbreaks of violence. The questions revolve around the extent to which this really generated internal European norms that states took as serious obligations. In sum, Westphalia resolved some important questions; but the answers to other questions here do not provide comfort. As Holsti aptly observes, "Westphalia produced a peace and a type of order designed to guarantee *that* particular peace, but not peace in general."[97]

To understand the evolution of an international law that embodies the ideas of prudence and restraint, one must understand the gap between the abstract ideas of the Enlightenment (18th century), embraced by many monarchs as the fashion of the time, and the dedicated pursuit of self-interest by those same monarchs. The gap between ideals and the pursuit of self-interest could not have been wider. As a school of thought, political realism applies with few caveats to the latter part of the 17th century and the whole of the 18th. After Westphalia, "sharks and minnows" was a real game with real consequences. Territorial expansion formed an integral part of the state-building exercise. Sharks gobbled minnows with little fear of retribution, even though the minnows may have had technical equality. Conquest conferred title. Historians and political scientists analyze this period as the era of *classical balance of power*, arguing that the Great Powers acknowledged some important rules of the game. Yet, these were rudimentary and certainly not legal rules. The economic and social linkages ("transaction links") that today often play into calculations of self-interest did not exist, or did not exist to the point of forming an important priority in interstate relations. States went to war because they had few options that would exert pressure on other states other than war or the threat of war. The most that can be said here is that the *idea* of a system of a European concert of powers floated around the salon circuit. Gordon Craig and Alexander George note:

> Writers on politics often talked of it as a desirable thing, in the sense that if it could really be brought into being, it might be able to develop the already recognized rules of international behavior into a more effective code of law that would restrain international violence and reduce the constant drain that war imposed upon state resources.[98]

Law did not presume to govern the relationship between war and peace—it governed relationships *in war and in peace*. International law said nothing about the transition, the decision to go from peace to war. One set of obligations applied in peace and quite another in war. Until the post–World War II era, texts in international law appeared in two volumes or sections: one that discussed the law applying to war (and neutrality), the second focused on laws regulating peaceful interaction.

TRENDS TOWARD RESTRAINT

Geoffrey Parker argues that attitudes toward atrocities in war began to change toward the end of the 16th century. He notes that Philip II of Spain ordered official judicial enquiries to determine responsibility for incidents that occurred during the war against rebels in the Spanish Netherlands. After the Restoration in England, a court of claims investigated accusations of war crimes committed by Cromwellian troops during the occupation of Ireland.[99] He also argues that an evolving pragmatism concerning the nature and goals of warfare led to reciprocal understandings concerning certain practices, such as prisoner-of-war exchanges and noncombatant immunity. In 1621, Gustavus Adolphus issued his *Articles of Military Lawwes to Be Observed in the Warres* as a guide for his Swedish troops in the Thirty Years' War.[100] After Westphalia, a widespread revulsion over the extensive havoc and destruction caused by the Thirty Years' War, the diminishing impact of religion as a motivating factor, and structural changes, such as the centralization of sovereign authority and consequent emergence of "national" armies discussed in chapter 1, resulted in major alterations in the composition of armies and the ends for which they would be used. Parker makes a case for the emergence of a rudimentary recognition that some rules, primarily based on reciprocity (mutual interest), could be beneficial even in war: prisoner-of-war exchanges and more humane treatment of POWs, giving quarter to defeated forces, the sanctity of sacred places, and some recognition of limits on deliberate attacks on those not directly part of the fighting. These rules did not apply universally, nor did they magically appear as obvious revelations to those engaged. Still, Parker argues that "most of the actions today outlawed by the Geneva Conventions have been condemned in the West for at least four centuries; only the degree and the extent of enforcement have changed over time."[101]

The move to larger, long-service, professional standing armies combined with the spread of gunpowder weapons produced some important changes in warfare. Restraint in action resulted from common pragmatic constraints that flowed from the undependable character of the individual soldier as well as from limitations imposed by technology in terms of weapons and logistics. Recruitment and training now became an ongoing expense in terms of both time and money. The tactics required for effective maneuver and musket fire required extensive drilling. Common belief held that turning a wastrel into a good professional soldier would take at least two years. Individual soldiers, though drawn from the dregs of society, now rose in value because trained troops lost in action could not be easily replaced.[102] Troops were ineluctably chained to extensive baggage trains, which in turn limited range and mobility. The tight tactical structure based on the necessity of concentrated musket fire, as well as the potential for mass desertion if a formation was broken, precluded systematic pursuit of a retreating enemy force or other spontaneous ad hoc initiatives that would lessen the discipline imposed by the rigid battalion formation.

In the period between the Treaty of Ryswyck (1697) and the French Revolution, warfare evolved into an endeavor of relatively limited engagements fought for limited objectives. Direct encounters in terms of large-scale battles were rare because of the potential costs of replacing manpower losses. The term "economy of force" took on a real and direct meaning. Wars could drag on interminably with armies never fighting a single action because "ingenuity in maneuver was more prized than impetuosity in combat."[103] Regular pay meant that plunder and pillage no longer formed a major source of compensation for soldiers, thus reducing the burden on noncombatants. To ensure discipline, all armies now had rules and regulations for conduct. An embryonic customary law relating to the vocation of a professional soldier was widely recognized in Western Europe. Armies "conducted themselves more or less according to this customary law."[104]

When Europeans fought outside of Europe, the rules did not necessarily come into play. The development of the idea that Europe, as the direct heir of Roman civilization, formed a distinct community of interest that embodied superior intellectual, cultural, and moral standards defined relationships with other peoples. European explorers found indigenous populations around the world to be un-Christian, loathsome, and living in abject ignorance. Note that these attitudes presumed the congruence of Christianity and civilization, which excluded a large portion of the inhabited planet as uncivilized and thus not subject to the rules of civilization or humanity. Given the unenlightened nature of their existence, they were not worthy of civilized treatment.[105] Normal ethical restraints did not apply. Along with the presumption of superiority, practical reasoning in terms of money and manpower supported harsh measures to erode the will to resist in order to subject enemy populations quickly. Harold Selesky argues that a second rational calculation, never openly stated, may have played a role as well. Given that native populations did not subscribe to European expectations of proper "civilized" war tactics, and Europeans lacked the skills (and often local knowledge) to fight an unconventional war, prudence dictated that dominance be established quickly to avoid a long war they were unprepared to fight.[106]

A Note on America and the American Revolution

Colonial wars in America, and the American Revolution as a distinct set of circumstances, provide an interesting study with respect to the observance of the rules of war just described. Colonization generated a major struggle between France and England for control of the North American continent as well as conflicts between settlers and the indigenous Indian population. The revolution itself involved another permutation in that the British had to decide how to characterize colonists who had declared their independence and resorted to arms to secure their goal.

The English settlers carried with them the European view that Indians were non-Christian, unenlightened savages. Relationships between early colonists and the Native American populace deteriorated quickly. Massacres occurred on both sides. Toward the end of the 17th century, French colonists made alliances with several tribes. Selesky writes that the English were "outraged at the role Frenchmen played in encouraging, allowing, and even emulating . . . barbarities,"[107] while seeing their own actions as just retaliation and "teaching a lesson." Space does not permit a long analysis here, but one must note that because they lacked both money and manpower, the colonists never had the luxury of a disciplined army led by professional officers with sufficient experience to mount successful campaigns under frontier conditions. Selesky states simply that "they were amateurs at war," untrained and undisciplined. Such troops often adopted the tactics of their adversaries because they felt they had no other choice. He also maintains that with respect to dealing with the Native American population, nothing changed over time: "No holds barred conflict was the common element in relations until the eclipse of the frontier in 1890."[108]

The American Revolution

The American Revolution posed an interesting problem for both sides. For the British, the opponents were English colonists, presumably part of the civilized world, not a barbaric aboriginal tribe. Moreover, not all colonists supported the movement for independence, so the revolution also had elements of a civil war. Yet those who had rebelled were traitors. In the final act, the war was also an international one with consequences for European politics. The British had to walk a very fine line because they wished to retain the colony as part of the empire and did not wish to alienate supporters by using harsh actions.[109] The American Revolution may be one of the first instances of a war that involved the idea that winning the hearts and minds of the people formed an important objective. The rebels, though well organized, did not comprise an overwhelming majority. Through a judicious use of force and political compromise, the British hoped to convince the Americans that military resistance was futile and to accept their status as part of the empire. To accomplish this, British forces would have to win quickly and decisively with minimal casualties and impact on the civilian population. British officers who had served in the French and Indian War believed that this would be possible because the colonists lacked the capability of assembling, training, managing, and sustaining a systematic military campaign of any magnitude. A small number of agitators and dissidents would, of course, be appropriately punished.

On the American side, George Washington and the Continental Congress faced similar challenges. Those uncommitted or opposed to independence may have comprised as much as 45 percent of the colonial population. Dispersion, ethnic diversity, and differing economic dependency on trade with England among the colonies added to internal divisions among the colonists.[110] Constraints on recruitment as well as scarcity of food and other essential supplies formed a constant set of worries during the first two years of the war. Nonetheless, Washington and others, cognizant of the need to keep the loyalty, or at least the neutrality, of the civilian population, actively promulgated "Articles of War" among his troops that expressly forbade plunder, pillage, rape, and other depredations against civilians. Moreover, even in the darkest hours, when his troops were starving and freezing at Valley Forge, Washington did not resort to confiscation of food and supplies. American leadership, in their quest for European support, also wished to demonstrate that they understood and subscribed to the conventions governing "humane" war.[111] They realized that stories of brutality and atrocity could affect support both at home and abroad.

Proportionately, the Revolutionary War ranks second, after the Civil War, in terms of American lives lost and property destroyed. One should not be surprised at this statistic simply because so few wars have been fought on American soil. Nonetheless, it drives home the fact that the term "humane" as used here implies a relative judgment in comparison with early times, not a judgment based on some ideal standard. Eighteenth-century battles could be bloody, but other local factors that upped the stakes in particular encounters entered into play in many cases. The use of German mercenaries, who had a reputation for giving no quarter, and their treatment of the civilian population, particularly in upper New Jersey, certainly colored many engagements. Commanders could not always control their troops in the heat of battle. The actions of the British in trying to mobilize their Indian allies against settlements along the frontier generated retaliation in kind by residents and their protectors. Even Washington had given orders to destroy Indian settlements, using the rationale that such action might cause them to abandon their British allies.[112] Add to this the simple observation that the chaos of the war also opened up opportunities for individuals to settle old grudges that had nothing to do with the central issue of empire or sovereign independence.[113]

When the war shifted to the south, the ethic of the frontier rather than that of the Enlightenment took center stage. The British adopted slash-and-burn tactics; the patriot militias retaliated in kind. Tempers often overrode counsels of temperance. The war threatened to spiral out of control into competitive, recurring, and potentially escalating cycles of retaliation and counter-retaliation. By a stroke of fortune, Washington and the French forced the surrender of Cornwallis at Yorktown in mid-October 1781. In March of 1782, the British Parliament passed legislation that declared that remaining American prisoners would be treated "according to the custom and usage of war, and the law of nations,"[114] formally acknowledging the nascent state as an equal.

Vattel

Despite the later controversy surrounding his work, a Swiss philosopher and diplomat, Emmerich de Vattel, produced what became the standard European reference work for international affairs: *International Law: Or, Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns* (1758), designed as a practical manual for statesmen.[115] Vattel drew his ideas from Grotius (1583–1645), Leibnitz (1646–1716), and Wolff (1679–1754).[116] Curiously, regardless of the use of "natural law" in the title, the major criticism of Vattel centers on his emphasis on volitional law (positivism) compared with that accorded to natural law. He argued that the ideas associated with just war theory promoted the escalation of violence rather than providing a framework for restraint. For the armies of the righteous, necessity would justify any action that contributed to success, but because both sides usually considered themselves in the right, nothing really constrained actions taken in the quest for victory and vindication. Still, he asserts:

> Nations that are always ready to take up arms on any prospect of advantage, are lawless robbers: but those who seem to delight in the ravages of war, who spread it on all sides, without reasons or pretexts, and even without any other motive than their own ferocity, are monsters, unworthy the name of men.[117]

Nonetheless, while war cannot logically be just on both sides, in many cases an objective determination may not be possible:

> One party claims a right; the other disputes it: the one complains of an injury: the other denies having done it . . . Wherefore, since nations are equal and independent and cannot claim a right of judgment over each other, it follows, that in every case susceptible of doubt, the arms of the two parties at war are to be accounted equally lawful, at least as to external effects, and until the decision of the cause.[118]

Unlike previous contributors to "just war" thinking, Vattel advocated limited tactics based on humanitarian considerations, not religious beliefs. In the rules he discusses, he outlines principles that define protected persons (noncombatants), treatment of prisoners of war, and legitimate targets and prohibits certain forms of "treacherous murder" and the use of poisoned weapons.[119] He states:

> The lawfulness of the end does not give us a real right to anything further than barely the means necessary for the attainment of that end . . . [W]e have a right to put in practice, against the enemy, every measure that is necessary . . . provided they be not of an odious kind, nor unjustifiable in themselves . . . [120]

Wherever severity is not absolutely necessary, compassionate moderation becomes a duty. But he also lays down a condition of reciprocity. When at war with "a savage nation, who observe no rules, and never give quarter," a belligerent may take measures to punish "in the persons of any of their people" in order to force them to respect the laws of humanity.[121] This comment reflects one aspect of military necessity—the problem of enforcing compliance with rules. In a broader sense, it epitomizes what is perhaps Vattel's most enduring and pithy contribution, *the prudential Golden Rule of Sovereigns: "One cannot complain when he is treated as he treats others."*[122]

The French Revolution

Between April 1792 (war declared against Austria) and 1815 (Treaty of Vienna), in the various conflicts involving France, one observes a mixed picture that includes episodes of both restraint and excess. With the declaration of war against Austria, the revolutionary government proclaimed the intent to wage war in a lawful manner. The French army still had a number of regular units and loyal noble officers, but as the ideologues took control, discipline crumbled until those seasoned by actual combat managed to take control. As time passed, increasingly the army "was neither fed, paid, nor clothed out of French resources but had to support itself and the French government by 'liberating' neighboring nations."[123] When fighting on foreign soil, Gunther Rothenberg declares that few armies "were as rapacious as the French."[124] As in the American Revolution, toward the end of the long struggle, a tendency toward plunder and pillage on the part of both the French and their opponents emerged.

Internally, local resistance by nonprofessionals mirrored the response and counter-response patterns of individuals on the American frontier—the customs and laws of war had little impact. The government acted ruthlessly to suppress an uprising in the Vendée (1793). Government troops burned villages and "indiscriminately slaughtered just under a quarter of a million armed as well as unarmed civilians."[125] Tens of thousands of civilians, POWs, and sympathizers with the revolution were massacred by the rebels. In the same vein, throughout the course of the wars, some of the bloodiest incidents would involve militias or irregular troops, the heat-of-battle syndrome, or the "inconvenience" of POWs.

Transition and Tension

To restate an important point, the relatively limited nature of war in the 18th century stemmed from a particular configuration of societal structure, level of technology, and requirements of economic production. All western European armies had adopted rules and regulations that governed the conduct of the professional soldier. These did mark progress in that, drawing on "the laws and customs of war," they forbade practices such as looting, plundering, and assaults on civilians, excluded certain people and places from attack, and called for quarter and humane treatment of prisoners of war. For professional soldiers, because the rules embodied an implicit reciprocity, they were largely observed because of obvious self-interest.

The French Revolution, combined with the ongoing impact of the Industrial Revolution, generated trends that produced radical changes in economic and social structures, which in turn resulted in dramatic changes in four essential factors: the fundamental nature of the relationship between rulers and the ruled, the social composition of armies, the ends for which wars would be fought, and eventually the fundamental character of war itself. In hindsight, the conflicts associated with the revolutionary period (1792–1815) foreshadowed some future changes, but on the whole, despite bloody incidents, the traditional rules and customs were roughly observed by all states.

On the one hand, the political ideas that challenged the foundations of the monarchical system terrified European elites, including the British. On the other hand, the possibilities associated with being able to field a mass army seized the imagination of military professionals, including Clausewitz. The fears associated with the spread of Republican principles coupled with the limitations of technology meant that the full implication of the wedding between the forces unleashed by the French and Industrial

Revolutions would not fully play out for 100 years. Fears of arming subjects, together with the problems of command and transport, placed political and practical limits on aspirations. As these constraints disappeared during the latter part of the 19th century, major tensions would arise between the nascent movement for humanitarian reform and the perceptions of military professionals. In this case, the views of the Prussian General Staff came to dominate military planning after the spectacular victories against Austria (1866) and France (1870–1871). Drawing on Clausewitz, the Prussian chief of staff, Helmuth von Moltke, believed that a restrained war using "the gentlest methods" may, in fact, be less humanitarian than a war that unleashes massive power as quickly as possible. Regardless, Prussia almost immediately embraced the idea of an international volunteer corps that would attend to the sick and wounded of war.

THE GENESIS OF INTERNATIONAL HUMANITARIAN LAW: THE INTERNATIONAL RED CROSS

The fascinating aspect of the genesis of the International Red Cross is that it sprang from the efforts of individual initiatives to form the organization and then lobby for state acceptance. The First Geneva Convention (1864) marks the first modern *international treaty* dealing with mitigating the circumstances of war.[126] Up until the middle of the 19th century, armies did not have any organized battlefield facilities to treat those who were wounded. The work of Henry Dunant would heighten concern over the sick and wounded, resulting in the First Geneva Convention (1864), which led to the creation of the International Red Cross.

In his quest for a meeting with Emperor Napoleon III concerning his failing business enterprise in Algeria, Dunant witnessed the battle of Solferino. The single-day encounter produced approximately 40,000 dead and wounded, many of whom were left on the battlefield. Appalled, Dunant set about organizing an effort to deal with the situation. He assembled teams of local women to collect material for bandages, locate food and water, and to tend to wounds as best as possible.

Upon his return to Geneva, Dunant wrote and published a book at his own expense, *A Memory of Solferino*, in which he proposed a scheme whereby private national organizations would care for the wounded in wartime.[127] More importantly, he proposed that the activities of such organizations should be recognized by international agreement. He also became an active advocate, using his business connections to generate speaking appearances and meetings with other influential individuals across Western Europe. His efforts resulted in a conference at Geneva in October 1863 to consider a draft convention produced by a committee then named the International Committee to Aid the Militarily Wounded, attended by 16 countries and three philanthropic organizations.[128]

After the successful termination of the Geneva Conference of 1863, the Swiss Federal Council, on the initiative of the Geneva Committee, invited several states from the Americas and the governments of all European states to a diplomatic conference for the purpose of adopting a convention for the amelioration of the condition of the wounded in war. The conference, at which 16 states were represented, lasted from August 8 to 22, 1864. The draft convention prepared by the Geneva Committee was adopted by the conference without major alterations. The main principles laid down in the convention and maintained by the later Geneva Conventions were as follows:

- Relief to the wounded without any distinction as to nationality
- Neutrality (inviolability) of medical personnel and medical establishments and units
- The distinctive sign of the red cross on a white ground[129]

To clarify some provisions of the Convention of 1864, and to adapt the principles of the convention to sea warfare, a second diplomatic conference convened at Geneva in October 1868. The additional articles adopted on October 20, 1868, remained in limbo because they never received a sufficient number of ratifications/accessions to enter into force.

The Lieber Code and the American Civil War

The second notable root of present-day rules applicable to warfare began in 1863 when general-in-chief for the Union Army, Major General Henry Halleck, commissioned a Columbia Law School professor, Francis Lieber, to write a code of conduct for the Union Army. Earlier in the war, Lieber had helped the administration by providing a theoretical analysis and a practical framework for dealing with Confederate prisoners and the Confederate use of irregular combatants—marauders and guerilla fighters. In this document, Lieber had developed requirements for a participant in war to be considered a legal combatant that still form the basis of modern law.[130] His opus, *Instructions for the Government of the Armies of the United States in the Field*, issued to the Union Army during the American Civil War on April 24, 1863, as General Orders No. 100, impressed military men elsewhere.[131] As the first *codification* of the law regulating the behavior of soldiers on the battlefield, the Lieber Code not only influenced the development of manuals for other countries but remained the principal legal guide for the U.S. military until 1949, when revisions were made to take into account changed views (1949 Geneva Conventions). The Hague Conventions of 1899 and 1907, as well as the 1949 Geneva Conventions, owe much to Lieber's work. The *Instructions* became the model for numerous national manuals (Italy, 1896 and 1900; Russia, 1904; and France, 1901 and 1912). It also influenced two private attempts at codification—the 1880 Institute of International Law prepared the so-called *Oxford Manual* (*Manuel de Lois de la Guerre sur Terre*) sponsored by the Institute of International Law and the 1894 work by Friedrich Geffcken, which also anticipated several important aspects of the 1899 and 1907 Hague Conventions.[132] The *Oxford Manual* is still cited with approval by European writers.

Lieber saw war as a vital part of the moral progress of dynamic nations.[133] The code itself represents the tensions inherent in the changing landscape of war—an emphasis on the potentially unlimited nature of war with an overlay of moral concern. Heavily influenced by Clausewitz, Lieber argued that Enlightenment rules did not reflect the realities of modern warfare. Instead, he articulated a modern notion of a just war, in this case focused on the suppression of secession and elimination of slavery as an institution but not the total destruction of the enemy. The best summary of his view is Article 30, which states: "War has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor." The political object is the goal, war is the means of reaching it, and the means can never be considered in isolation from their purpose. Hence, purpose governs and justifies the means to achieve it. *In the abstract, this places no meaningful restraint on means because as costs mount, one need only inflate the value of the end(s) for which one fights*. From a moral perspective, one might consider the formulation as a *theory of ultimate, though mutable, ends.*

Clausewitz stated that the idea of a law of war to restrain nations was inherently absurd: "War is thus an act of force to compel our enemy to do our will . . . To secure that object fully we must render the enemy powerless; and that, in theory, is the true aim of warfare."[134] Hence, Lieber argued that once war begins, "the more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief" (Article 29). The best and most humane thing is to carry it on as forcefully as possible in order to end it as soon as possible. Actions are not limited to armed combat: "War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy" (Article 17). Still, some limits to means do exist: "Unnecessary or revengeful destruction of life is not lawful" (Article 68)." The killing of enemy soldiers is limited by the requirement that such deaths must be directly related to *what is necessary* to win a battle, protect your own soldiers, or win a war.

The Lieber Code contains many provisions that have become part of the rules of contemporary war: civilian deaths should be avoided where possible; captured civilians may not be killed, tortured, or enslaved; prisoners of war should be treated decently, fed, housed safely, and not tortured (Article 49); prisoners of war can be exchanged or paroled (but do not have to be, Articles 48–80); and civilian property and the property of a conquered nation should generally be respected (but an invading force may take or destroy the property of its enemies under a variety of circumstances, Articles 31–38); no army may use poison (Article 16); flags of truce are to be recognized (Art. 111); spies may be summarily executed (Article 83). The code prohibited soldiers from taking public or private property for their personal use as booty or as trophies of war (45). Neither officers nor enlisted men should profit from the property they might seize on behalf of the government (46).[135]

THE PARAMETERS OF CHANGE: TECHNOLOGY, PROGRESS, AND VISIONS OF PEACE

The most important point to make here is to restate the observation that the pace of change in terms of both technology and society had accelerated in Europe (and the United States) because of the continuing impact of the two late-18th-century revolutions—the Industrial and the French. During the late 19th and early 20th centuries, when compared with the previous 300 years, the forces unleashed produced a rapid economic and political evolution. The developments in scale of production, transport, and communication spurred trade and travel, leading to increased interaction among Europeans both at the state and individual level. European perceptions and decisions set the standards for others. European countries controlled large areas of the world through colonial occupation. European elites now shared expectations about the benign effects of continued "progress" and the consequent spread of "civilization." The modern idea of nationalism in that an individual's identity had become inextricably intertwined with the fate of the state added a new factor. Toward the end of the 19th century, public opinion began to play a significant role in government decisions in England, France, and Germany, less so in the still-autocratic Austria-Hungary and Russia.

As discussed earlier, the parameters of war changed in major ways over the course of the 19th century, but thinking about the nature of war did not. Romantic images of war as the proving ground for men and nations found support in the ideas of Social Darwinism—the best and fittest would survive. The carnage of the American Civil War supplied considerable evidence that much had changed, but the German victories over Austria and France shortly after the end of the Civil War superseded what Europeans demeaned as a provincial American experience and became the standard paradigms used for future European war plans. Massive preemptive mobilization became the oft-repeated mantra that promised a short war and ultimate victory for someone. Of course, the idea of victory now ignored the rise of nationalist sentiments that might not accept old-fashioned ideas of a negotiated settlement that produced less than promised by leaders promoting war. Public opinion when suffused with national pride would place severe constraints on options open to decision-makers. Once the wider public became invested in the cause, ending a war short of a popular perception of victory would become a problematic exercise.

Alongside the themes that accepted and glorified war, classical liberal economic thought formed a stream of analysis that saw in the increasing beneficial interconnections between nations the path to a peaceful coexistence with nonviolent methods of resolving conflicts between states. Simply, liberal thought held that gains from war could never outweigh the losses incurred by the costs of mounting the war, the devastation and losses resulting from its prosecution, and the inevitable losses from disruption of significant transaction links in terms of trade and other peaceful intercourse that yielded continued positive gains.[136] Victory in any future war would be Pyrrhic, because the gains could never justify the costs.

In the most perceptive and rigorous critique of ideas about war at the beginning of the 20th century, Ivan Bloch concluded that any idea of victory in modern war had little meaning. His work yields an amazingly accurate forecast concerning the course of World War I and the role industrial economies and nationalism would play. Bloch, who did not subscribe to liberal principles, argued that any major war would be long, with great losses on all sides. It would last as long as the economies redirected to support it could do so, and it would result in severe economic dislocation and loss for both victors and vanquished—the costs would result in a struggle of attrition and eventual bankruptcy and famine.[137] European professional military staffs dismissed Bloch's work as that of an uninitiated amateur.

In addition to liberalism, peace movements encompassing many different strands of philosophic traditions, including Christian religious thought (not just Quakers), promoted schemes to reduce the necessity for war.[138] David Caron argues that "a distinctive feature of the nineteenth century peace movements was their faith in international arbitration, and particularly adjudication before a permanent international court."[139] Limitation of armaments was the task of the peace movements prior to 1914, but their efforts had produced few results. Calvin Davis has observed that a strange dichotomy of thought existed in the United States and Europe. International rivalries had become increasingly intense, and talk about national interest dominated the news. Still, on the other side of the coin, never had there been more evidence of a popular interest in maintaining peace. Peace groups received broad public support and attention from statesmen, who saw them as an important enough and influential constituency to give support at least in principle.[140]

The major states did accept an 1899 proposal from Tsar Nicholas II for a meeting to discuss arms control. The First Hague Peace Conference met from May 18 to July 29, 1899, with 26 nations in attendance. The conference did not occur because of any sudden outbreak of pacifist feelings among the ruling elites of Europe but from a Russian desire to slow the pace of an arms race that had become increasingly costly and burdensome. Although the conference of 1899 failed to achieve its primary objective, a limitation on armaments, it did produce conventions that more precisely defined the conditions for declaring a state of belligerency, as well as attempting to codify some other customs relating to war on land and sea. The 1907 conference would modify and expand these. Further, three declarations were accepted—one prohibiting the use of asphyxiating gases, another prohibiting the use of expanding bullets (dumdums), and another prohibiting the discharge of projectiles or explosives from balloons. Last, and most important, was the adoption of the Convention for the Pacific Settlement of International Disputes, creating the Permanent Court of Arbitration.[141]

The Second Hague Conference in 1907 generally receives more attention because of its work in codifying the laws of war. The conference produced 14 separate multilateral instruments. Of interest for this discussion is language in the preamble to Hague Convention IV (Convention respecting the Laws and Customs of War on Land—a revision of the 1899 Hague II Convention). One statement perfectly encapsulates the attitudes and hopes discussed earlier. The preamble to Hague Convention IV states that those who drafted the convention were "animated by the desire to serve even in this extreme case, the interests of humanity and the ever progressive needs of civilization."[142] The important point here is that the conventions adopted at these two conferences continue to form the basis for discussion about revision and extension of rules governing warfare. At the dawn of the century of total war, in good faith, men with good intentions believed that if the resort to war could not be prevented, the course of war itself could be subject to rational limits.

The Hague Conferences closed the 19th century and opened the 20th by setting important precedents for the future. They established an agenda for negotiation in the parliamentary-diplomatic mode, elevated the development of mechanisms of dispute resolution to new prominence, tried to impose order on many areas of armed conflict with new international rules, and perhaps unintentionally, set parameters for the future diplomacy of international conferences. The second meeting was actually delayed by the Russo-Japanese War; the third, planned for 1914/1915, was canceled by war. Subsequent international lawmaking efforts have grappled with many of the themes debated at The Hague. The political landscape of international law has been completely transformed by the breakup of empires, the advent of almost 200 new states, and the founding of myriad international, regional, and nongovernmental organizations that could not have been envisioned by anyone in 1899. Add to this the establishment of several truly permanent international judicial institutions. Despite these changes, The Hague Conferences left a deep and lasting imprint on international law and procedure. Aldrich and Christine Chinkin maintain that "the mixture of lofty rhetoric, prophetic international legal vision, and narrow political interest of The Hague Conferences became a characteristic, even an expected feature, of collective international lawmaking efforts in this [i.e., the 20th] century."[143]

A Note on Violations

The Hague Conventions lacked formal mechanisms for enforcement despite a number of statements about state responsibility. Article 3 of Hague Convention IV (1907) does provide that

> a belligerent party which violated the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The wording provides no clues to answers for many essential questions. It remains rather open-ended with respect to what states or other entities would have standing to make a demand, as well as questions relating to the criteria that might define "if the case demands" as a condition.

Curiously, while war was not governed by law, presumably the law did regulate the resort to force short of war (reprisal, retaliation). As Ian Brownlie points out, during the 19th century, as mass armies' increasing interdependence and public opinion made war more expensive and difficult to justify both politically and pragmatically, states increasingly resorted to more limited uses of force rather than war. In the customary law, reprisal and retaliation were forms of self-help ostensibly governed by the twin principles of necessity and proportionality. In the customary law, retaliation and reprisal were forms of self-help governed by time frame (necessity), purpose (principle of proportionality), and appropriate targets. Prior to the 1920s, the literature on the customary law differentiated between retaliation and reprisal.[144]

THE INTERWAR PERIOD (1919–1939): LIMITING THE RESORT TO WAR

As appalling as the bloodshed in the First World War, the simple truth is that, for the most part, the participants on the main fronts observed the laws of war. Much of the criticism and response issued from moral anguish over the human and material costs, not concerns over massive violations of law. The respective armies simply engaged each other with unprecedented means of accomplishing the central task of weakening the forces of the enemy. The results ended any reference to "civilized" warfare or the beneficial impact of war.

After World War I, the new buzz words became "aggression" and "aggressive war" because the new task was seen as preventing war, not making it more humane. Hence, the primary focus was on revising the *ius ad bellum*, not on refining the *ius in bello*. The Treaty of Versailles has only one explicit reference, but defining aggression became a cottage industry in the interwar period. Article 10 of the Covenant of the League of Nations contains the only explicit reference to aggression in the Versailles Treaty. Julius Stone observes: "It is an irony . . . that though Article 10 was the one in which the term 'aggression' appeared, that article tended to be shunned by most League Members as a focus for the sought-for criteria for aggression."[145]

The Covenant of the League of Nations provided in its preamble an acceptance by the contracting parties of an obligation not to resort to war. Nonetheless, the covenant did not prohibit war. Member states could still go to war under certain conditions (Article 12; Article 13; Article 15[7]; Article 17). The assumption that debate and time could defuse situations that might otherwise erupt into overt conflict underlay the procedures and obligations states had under the covenant. Article 16 of the covenant did provide for the imposition of sanctions against a member of the League of Nations that resorted to war in violation of its obligations under the covenant. In practice, the article was applied in only one of the five major instances in which such a violation did take place. When Japan invaded Manchuria in 1931, the assembly concluded that "without any declaration of war, part of the Chinese territory has been forcibly seized and occupied by the Japanese troops."[146] Nevertheless, the assembly finally decided, Japan had not resorted to war in violation of the covenant, and therefore Article 16 did not apply.

Kellogg-Briand Pact (Pact of Paris, 1928)

The General Treaty for the Renunciation of War, better known as the Kellogg-Briand Pact or Pact of Paris, was signed in Paris on August 27, 1928, by representatives of 15 states and was ratified or adhered to by 65 nations.[147] Much has been written about the Kellogg-Briand Pact, deriding its idealism and lack of impact. Still, the agreement does stand at the center of the efforts to outlaw *aggressive* war. Note the adjective "aggressive" because none of these proposals really prohibited every kind of war. The resort to war was still permissible in self-defense and as an instrument of collective action to restrain an aggressor. As with the covenant, the treaty also did not abolish the resort to war between a party to the treaty and a country not party to the treaty. The pact, furthermore, did not prohibit the resort to war against a country that had violated the treaty's provisions.[148] The pact contained no provision for denunciation/withdrawal, no means for enforcing compliance, and lacked any alternative mechanisms or methods for peaceful resolution of disputes.

More important, in many respects, were the efforts made to establish aggressive war as an illegal enterprise. In 1923, the Treaty of Mutual Assistance, which never came into force, attempted to identify wars of aggression as an international crime. In its preamble, the abortive Geneva Protocol of 1924 similarly labeled aggressive war a crime (preamble).[149] Its Article 2 imposed an obligation on all parties to the agreement to refrain from war except in the specific circumstances listed in the treaty. In 1927, the Assembly of the League passed a resolution under which all wars of aggression would be prohibited, mandating that only pacific means were to be employed to settle international disputes of every kind. This approach reflected the provisions of the Treaty of Mutual Guarantee (Locarno Treaty) of 1925. In 1928, the Sixth Pan-American Conference adopted a resolution asserting that a "war of aggression constitutes a crime against the human species—all aggression is illicit and as such is declared prohibited." None of these measures had any teeth because, despite many different efforts to develop a definition, the competitive interwar political environment foreclosed any possible agreement on a common set of actions that would constitute aggression. It would take World War II and a new multilateral treaty, the Charter of the United Nations, to move the international community to place potentially meaningful restrictions on the resort to force. Even then, the quest to define "aggression" would continue.

Both Kellogg-Briand and the covenant raised important questions about how far and fast the law can evolve. To reiterate a point made earlier, to be effective, any rule, must correspond equally to both the needs and the practice of states. Charles de Visscher expressed this concept well when he wrote, "A normative (lawmaking) treaty the content of which is too far in advance of development in international relations is stillborn, just as a treaty that ceases to be exactly observed in the practice of governments, is no longer valid in its formal expression."[150] Indeed, the international landscape is strewn with conventions that have little or no effect, many of which never entered into force even though they sounded like a good idea at the time. Or, as Percy Corbett, the eminent lawyer who translated de Visscher's book, observed, "Law cannot be built upon a heedless sacrifice of reality."[151] Progress depends on a judicious blend of idealism and pragmatism; otherwise, the lowest common denominator will always define expected norms of behavior.

At the outbreak of World War II, statesmen and lawyers alike still postulated an essential connection between the availability of force as a sanction and the preservation of state interests. Despite the trappings of a treaty, Kellogg-Briand had no impact on state practice. Many of the states that had signed it denied validity through their own actions. Armed conflicts in the ensuing decade were both more numerous and more serious than they had been between 1919 and 1928. Tom Farer, a prominent contemporary international lawyer, has noted, "A process of decision making constitutes a normative system only when those affected believe that in general they have an obligation to obey its results."[152]

INTERWAR DEVELOPMENTS IN INTERNATIONAL HUMANITARIAN LAW

Prisoners of War (1929)

One finds many references to the Geneva Convention in movies and television shows about World War II. Obviously the reference cannot be to the 1949 treaties by the same name, but many people confuse them. The 1907 Hague Regulations (Articles 4–20) provided in detail for the humane treatment of prisoners. Unfortunately, the actual practices of belligerents during World War I illustrated the inadequacy of the rules and the many gaps that needed to be filled. In July 1929, the representatives of 47 states met in Geneva at the invitation of the Swiss government in order to improve upon the earlier requirement. The conference succeeded in drawing up two instruments—the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, and the Convention on the Treatment of Prisoners of War.[153] Following widespread ratification, both conventions were in effect when World War II began. Only relations between Germany and the Soviet Union were not governed by those two instruments during the conflict. But, again, belligerent practices indicated the need for further conventional safeguards for prisoners of war.

Chemical and Biological Weapons

The First Hague Conference (1899) adopted a declaration, signed by 16 states, that prohibited the parties from using shells to distribute asphyxiating gases. The U.S. delegation refused to sign this prohibition as inconsistent with already accepted methods of warfare. When Germany used poison gas in World War I, the Allies retaliated in kind, justifying their action as a reprisal. Both sides stopped gas warfare upon discovering that they could not control the drift of clouds of poison gas. The peace treaties ending the conflict reiterated the prohibition on asphyxiating gases. States still felt the need to make the prohibition more explicit. In 1925, the Geneva Gas Protocol[154] prohibiting the use in war of asphyxiating, poisonous, or other gases, as well as of bacteriological methods of warfare, was signed by representatives of 28 states including the United States. It entered into force in April 1929.[155] Because 128 countries have now formally adopted the protocol, most writers today agree that the Geneva instrument is binding on all states through the development of a general rule of customary international law. Interestingly, the Geneva Protocol does not prohibit the production, acquisition, stockpiling, or use for nonwar purposes of the forbidden substances of warfare—only their use in conflict.

The 1949 Geneva Conventions

In looking at the Second World War, many tend to overlook the huge civilian toll. The effectiveness and contribution of open city bombing toward hastening the end of the war, culminating in the destruction of Hiroshima and Nagasaki, still remains a topic of considerable debate.[156] R. J. Rummel includes the dropping of the atomic bomb in his analysis of democide, and many have questioned the lack of critical examination by American and British historians.[157] In a different view, Adam Roberts argues that "it is easy to condemn this involvement of civilians. Yet those fighting the Second World War on all sides were driven to this by an understandable desire to avoid the disasters of 1914–1918."[158] The debates in the aftermath did raise many questions about the laws of war, one of which was the simple fact that a number of the countries involved had neither signed nor ratified The Hague Conventions. Article 2 of Hague Convention IV states: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention." Arguably, this should mean that all states that had not signed/ratified could still be bound by the customary law of war, which then leads to questions about how much of The Hague Convention represented a codification of customary law, and to what extent had those nonparticipant states parties acknowledged the customary law.

From a different perspective, blaming the insufficiency of legal rules does not yield a satisfying explanation for the seeming indifference to civilian casualties. True, the provisions concerning the distinction between soldier and civilian might not have been well developed with detailed rules. Nonetheless, the issues did not concern law or the lack of it. The problems flowed from political attitudes that considered even the minimal values enshrined in the law as irrelevant, if not pernicious to a successful prosecution of the war effort. In short, if the will to impose and enforce restraints embodied in existing law is generally absent, one cannot blame "the law" because law has no independent force apart from the political will to observe its limits.

The experiences of the war led to the drafting and general acceptance of four more Geneva Conventions:

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (T. I. A. S. 3362) (GC-I)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (T. I. A. S. 3363) (GC-II)

- Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (T. I. A. S. 3364) (GC III)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (T. I. A. S. 3365) (GC IV)

The first, dealing with the sick and wounded, expands upon the 1929 Geneva Convention on the same subject. The most notable of the four is GC IV. This was the first multinational treaty that had as its sole focus the protection of civilians in wartime. Before this convention, only individuals in occupied territories had any type of protection under international law. The four treaties have universal acceptance. The treaties also incorporated some important innovations. First, as a condition of ratification, they required states to enact domestic legislation enabling prosecution of violators. Second, they committed states to arrest and try individuals accused of violations. Third, each treaty contained a category of offenses termed "grave breaches," comprised of the following:

- Willful killing
- Torture or inhumane treatment (including medical experiments)
- Willfully causing great suffering or serious injury to body or health
- Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly
- Compelling a prisoner of war or civilian to serve in the forces of the hostile power
- Willfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial
- Unlawful deportation or transfer of a protected civilian
- Unlawful confinement of a protected civilian
- Taking of hostages[159]

The 1977 Protocols Additional [160]

The 1974 conference to revise and update the 1949 conventions served as a testament to the changing international environment. The state-against-state type of warfare envisioned in the UN Charter and the 1949 conventions was rare, while internal conflicts, especially those associated with demands for an end to colonial rule, had proliferated. In what would become a pattern, the United States was in the forefront of the movement for revision but refused to ratify the resulting treaties. Much to the dismay of the United States and other Western powers, the conference included representatives from several high-profile "recognized" national liberation groups, such as the Palestine Liberation Organization (PLO) and the African National Congress (ANC). These groups had nonvoting observer status but still wielded considerable influence in the process. The politics of the conference signaled a new era in international negotiation and treaty drafting that would continue to play out during the later Rome Conference, which developed the final version of the Statute for the International Criminal Court. The "one state, one vote" format meant that the most powerful states did not have the means to impose their views on revision. The small and weak, many of which had recently acquired their independence from colonial rule, had great influence. Particularly objectionable to Western states were the terms "colonial domination, alien occupation, and racist regimes" (CARs) that found their way into both treaties. As the International Committee of the Red Cross (ICRC) commentary perhaps plays down, some of the new obligations introduced "fairly bold innovations."[161]

The two protocols are supplementary additions, not replacements for the provisions of the 1949 treaties. The United States has still refused to ratify either of the treaties, but regardless of the controversy surrounding their adoption, both protocols have now received ratifications or accessions from almost 90 percent of recognized states; this includes China and the Russian Federation as well as all European NATO states. The two protocols have become an integral part of the Geneva regime.

CHAPTER 3

Contemporary Law Relating to Armed Conflict: What Is a War Crime?

> War brings out the best and worst in men. It encourages solidarity, devotion to duty and heroism, but it also puts a premium on aggressiveness, promotes permissiveness and license for the use of force and loosens the usual constraints on sadism, and all of this inevitably leads to excesses in violation of the laws of war.
>
> —Guenter Lewy[1]

WAR, ARMED CONFLICT, AND HUMANITARIAN LAW

To provide a background for the debates over regulating war, the previous two chapters have discussed both the *ius ad bellum* and the *ius in bello*. The *ius ad bellum* determines *when* wars may be fought; the *ius in bello* governs *how* wars may be fought. Because different rules and laws apply to conduct in a state of war, having a reliable set of criteria to determine exactly when a state of war begins and ends, and to whom, and to what locales various sets of rules and laws apply, becomes very important. Killing enemy soldiers in war is not murder because soldiers, as authentic agents of the state, are legally entitled to kill enemy soldiers. Hence one straightforward reason that exact dates of initiation and termination are needed is to mark with precision when soldiers can and cannot legally kill—to delineate between legitimate and illegitimate uses of violence. Murder can be committed in a war zone. Prior to the entry into force of the Charter of the United Nations (1946), states could overtly declare war, and treaties of peace or truce defined the conditions for termination of hostilities. Articles 2(4), 51, and 52 in the charter limit the use of force by states to individual or collective self-defense. Article 2(4) forms the primary obligation of the charter:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations.

Articles 51 and 52 permit a state or a regional collective security organization such as the Organization of American States (OAS) to respond "if an armed attack occurs against a Member of the United Nations." After the charter prohibited the use of force across borders by states except in self-defense, the problem of regulating force became more rather than less complex.

The goal of invoking international legal prescriptions to frame the modern law of armed conflict has always been a daunting and highly politicized task. International humanitarian law (IHL)/Law of International Armed Conflict (LOIAC) tries to draw a balance between two opposing impulses—the push of military necessity in terms of winning, and humanitarian considerations of trying to "provide relief from the tribulations of war as much as possible."[2] It aims at minimizing human suffering without undercutting requirements for effective military operations. Does law lessen the frequency of battlefield crimes? With serious training the answer is probably, but the reality is that violations will happen. We give guns to young soldiers and place them in situations of extreme stress where split-second decisions that potentially have life-or-death consequences have to be made. Nonetheless, as Yves Sandoz argues, "War should not be an excuse for someone who has joined the army to turn into a brigand. A soldier is not a bandit and must not behave like one."[3]

Note that the Geneva Convention for the Protection of Prisoners of War (1929) came into being as a response to the massive numbers of prisoners who were subjected to unspeakable abuse during the First World War. Likewise, no international treaty for the protection of civilians in armed conflict existed until after the Second World War, in which large numbers of civilians were subjected to indiscriminate attack, mass extermination, deportation, and hostage-taking. After World War II, the expectations about what the future would hold in terms of conflict that underlay the charter never fully materialized. Unlike the past, most wars now do not involve conflict between equivalent nations or coalitions of great industrial powers. Rather than war between states, various types of low-intensity, often noninternational, conflicts have emerged.[4] Many of the armed conflicts today display a common set of characteristics: a weak state apparatus, widespread poverty, competition over dwindling natural resources, multiple violent nonstate actors, and the involvement of powerful regional states. Transboundary terrorism sponsored by organized nonstate groups presents a continuing challenge in terms of legitimate and effective countermeasures. In the 21st century, conflicts often have no well-defined battlefields. Enemies are disguised and dispersed, and direct and decisive engagement is rare. We live in a semi-Orwellian age where war and peace blend with one another even as we continue to insist on the differences between them. The term "war" now actually has little legal content. A broader term, "armed conflict," has replaced it.

Still, the use of force by modern states in the contemporary world involves an extremely complex organizational endeavor. The necessity of management places law (and domestic regulations) at the center of military operations. Law structures logistics, command and control, and the interface with all the institutions, public and private, that have to be coordinated for military operations to succeed. In principle, no target selection, no ship movement, no air raid happens without a review for compliance with regulations. In the Western world, with the media attention given to operations plus the necessity of controlling and managing people and technology, like it or not, the contemporary use of force by Western states is infused with concern for legality.

In the U.S. military, uniformed military lawyers, career judge advocates, are the compliance unit within the military. They work to ensure that commanders and troops obey the rules of engagement that operationalize the law of armed conflict in a particular war or occupation. Lawyers mingle with the commanders and troops on the battlefield. They help devise the rules of engagement and train troops in those rules, both before they deploy and on the battlefield. At the same time, they provide ongoing advice to commanders and commanders' staff on the battlefield. In interviews, the lawyers report that they try to frame the rules using language that describes those rules as supporting the broader goals of the organization: military effectiveness.[5]

Yet room for a great deal of cynicism exists. Unfortunately, under the pressure from perceptions that a strict interpretation of charter norms is much too restrictive, the *ius ad bellum*, and to a lesser extent the *ius in bello*, have become a matter of more or less, not one of clear rules and sharp distinctions. Law today rarely speaks clearly with a single voice. Indeed, as law has become an ever more important yardstick for legitimacy, legal categories have become far too malleable to permit clear resolution of many of the most important questions. The question of "lawfare" couched in the language of "good lawyering" questions how deep the commitment goes. *Lawfare* critics argue that presenting issues in the form of lawyers' arguments cloaks an attempt to undermine core principles of the international legal order. Lawfare denotes "the use of the law as a weapon of war" or, more specifically, the abuse of Western laws and judicial systems to achieve strategic military or political ends. According to the Lawfare Project, "It consists of the *negative* manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted."[6] Skeptics often cite the exchange between Robin Cook, the British foreign secretary, and Secretary of State Madeleine Albright over NATO intervention against Serbia. Cook told Albright that he had "problems with our lawyers" over using force against Yugoslavia without Security Council approval. Reportedly, Albright responded: "Get new lawyers."[7]

Noninternational Conflicts (NIACs)

Since World War II, noninternational conflicts have been far more prevalent than traditional state-versus-state clashes. A study conducted by the Department of Peace and Conflict Research at Uppsala University categorized and analyzed all armed conflicts that had occurred following WWII. Of the 225 armed conflicts that had taken place between 1946 and 2001, 163 were internal armed conflicts. Only 42 were qualified as interstate or international armed conflicts. The remaining 21 were categorized as "extra-state," defined as a conflict involving a state and a nonstate group, the nonstate group acting from the territory of a third state.[8] In most of these conflicts, civilian/noncombatant casualties far outnumbered the military losses. At present, dealing with nonstate armed groups forms a prime dilemma for contemporary lawmakers and policy makers.

Prior to World War II, international law considered internal conflicts to be a domestic problem of the affected state. Texts identified three types of situations: rebellion, insurgency, and belligerency. The questions of international law revolved around the idea of *recognition*, which would give some *legal status* to the rebel group by foreign states. In particular, recognition as a belligerent community made the rebel group responsible for all violations of the laws of war and for the treatment of foreign property and citizens. For the most part, states were reluctant to extend recognition because it gave status to the rebels and was regarded as an unfriendly act by the state attempting to deal with the uprising.[9] The historical record does not show many instances where states formally recognized a state of insurgency or belligerency. In the contemporary era, states have relegated these ideas to the fabled dust bin of history. Nonetheless, the extensive literature on how to frame legal responses to the challenges posed by al Qaeda and other similar organizations illustrate the difficulties of extending the scope of older regimes to encompass new challenges and of developing and interpolating new laws and practices into existing standards.

While the word "war" continues to be used to describe situations, the term actually now has little juridical content. Because the UN Charter has limited the use of force to self-defense, in the post–World War II world, states have attempted to delete the term from their diplomatic vocabulary when justifying the resort to force. To use the United States as an example, history texts might refer to the Korean War, but officially, even though ostensibly authorized by the UN, President Truman and the U.S. Senate chose to label it a "police action."[10] The U.S. Congress never officially enacted a formal declaration of war with respect to Korea, nor has it done so for any of the conflicts after.[11] In consenting to the use of force against Iraq, the Congress passed a joint resolution, the Authorization for Use of Military Force against Iraq Resolution of 2002.[12]

The international conventions that form the basis of the contemporary law use "armed conflict" in place of "war" as a means of avoiding extended debates about whether or not a situation meets the criteria for war. The International Committee of the Red Cross maintains that the application of international humanitarian law does not depend on the existence of a formal state of war. It also maintains that the provisions apply to both sides in a conflict regardless of how the war started; that is, the application does not turn on whether or not one side violated a norm of international law.[13] Common Article 2 of the 1949 Geneva Conventions states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[14]

Common Article 3 extends the scope of the conventions to "armed conflict not of an international character."[15] It is the *only* article in all of the Geneva Conventions that specifically references noninternational conflicts. Some have described the article as a mini-convention within itself because it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character.[16] In another weird twist of international law, when Common Article 3 applies, it totally governs—no other parts of the Geneva Convention apply.[17] As discussed later, the language of Common Article 3 has engendered considerable debate.

An international armed conflict usually refers to an interstate conflict. The ICRC Commentary on the Geneva Conventions states:

> The substitution of [armed conflict] for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war" . . . The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict . . . [I]t makes no difference how long the conflict lasts, or how much slaughter takes place.[18]

Still, no widely used definition of a noninternational armed conflict existed until the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case had to grapple with the issue.[19]

The ICTY decided that a noninternational conflict exists when there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[20] In the view of the ICTY, a noninternational armed conflict must have two essential elements: nonstate armed groups engaged in protracted hostilities and evidence that these groups are organized. Even so, the panel still had difficulty in applying the definition to the situation in the former Yugoslavia. The best that can be said here is that not all armed conflicts are wars, but all wars are armed conflicts.[21] We shall return to the issues generated by these definitions in the discussions of particular cases and incidents.

The remainder of the book will focus primarily on the *ius in bello*. The reasons for this focus are twofold. First, the debates over the parameters set by Articles 2(4), 51, and 52 in the charter have not led to any post–World War II trials for illegally initiating a war. Second, addressing the issues and arguments over the conditions that define a legitimate exercise in self-defense in the contemporary world would require a separate, rather lengthy treatise.

SOURCES OF INTERNATIONAL LAW

The sources of LOIAC and IHL are rooted in both customary and treaty law. More than any other area of international practice, a grasp of the relationship between the two sources is critical for an analysis of application in practice. United States Army Field Manual 27–10, *The Law of Land Warfare*, identifies treaties (or conventions) and custom as the sources upon which it draws.[22] The following discussion briefly examines the nature and characteristics of the principal sources.

International Conventions[23]

International agreements go by many names. Besides the common varieties, such as "convention," "agreement," "protocol," "treaty," and "covenant," and the less common "final act," "general act," and "declaration," a bewildering array of relatively rare terms confronts the reader. Among them, to list but a few, are "arrangement," "accord," "code," "compact," "contract," "regulation," "concordat," and "statute."[24] This section will use "treaty" and "convention" as interchangeable terms. In contrast with the situation of 100 years ago, multilateral treaties and conventions now generally constitute the major source of international law. Multilateral treaties as explicit and deliberate agreements among states constitute the closest parallel to a legislative function at the international level.

Multilateral treaties may have *authentic texts* in two or more languages. An authentic text is one that has been accepted by the parties as corresponding in content to a text in another language. Under normal circumstances, both are considered equally valid. A provision in the treaty will identify the languages considered authentic. The text of a treaty may be worked out and adopted in one language, but its authenticity is then established in two or more languages. If a treaty specifies two or more authentic texts, then in accordance with the general rule its text in each language is considered equally authentic in that they are equally genuine and have equal validity. Because translation is not an exact science, in the event of differences in interpretation, the treaty may provide that preferential force is to be given to the text in the language (or languages) indicated directly in the treaty. Article 111 of the Charter of the United Nations stipulates: "The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states."

To understand the limits of lawmaking treaties, note first that the provisions of a treaty will apply only to those states that have either *signed* and *ratified, or* have *executed an instrument of accession to* a particular convention. Ratification or accession officially signifies the formal declaration of consent—the proof of final acceptance of the treaty provisions by a state. Both procedures require the deposit of an appropriate statement, which denotes a public acknowledgment of formal consent, with the office of the secretary-general.[25] Signature alone might signify intent, but it does not carry any binding legal obligations.

Other than the requirement for registration, international law does not specify the exact internal procedure(s) for ratification or accession to a treaty. In the case of the United States, ratification incorporates a treaty into the U.S. domestic legal code, meaning that after ratification (and proclamation by the president), a treaty will have exactly the same status as duly enacted federal statutes. *Note that if the initial number of ratifying states is small (or does not include the powerful), a multilateral treaty will not create a new rule of general international law but only a rule of particular or regional application among the consenting states.* States that specifically refuse to acquiesce in the new rule by refusing to ratify the treaty are, of course, not *normally* bound by the rule, principle, or interpretation in question (see the next section on custom). Even though the United States signed the Rome Statute of the International Criminal Court (ICC), at this writing, the Senate has not given its consent to ratification. As a consequence, the United States is not legally bound by the provisions of the ICC.

International Custom

Custom represents a second source of international law. In contrast to the normal meaning of the term—the description of a habit—a legal custom represents a usage with a definite obligation attached to it. Customary law says that a state should follow the normal behaviors useful in facilitating international contacts considered essential to peaceful relations, even though no formal written agreement exists to define the obligations in detail. Although no formal legal code specifies the obligations, failing to follow a rule established through legal custom raises the possibility of sanctions or retaliation because noncompliance entails a violation of what the international community has accepted as an obligatory duty toward other nations. *The strength of customary law is that new customary rules can emerge rapidly, particularly in the wake of technological change that produces situations inadequately covered by the old law.* To advance a simple proposition about how customary law comes into existence and evolves, consider that need defined by functionality lies at the heart of the matter. This does not argue that pure need for an appropriate rule always generates an appropriate rule, but observing the areas in which customary practice first evolved widely recognized rules considered as law, the combination of need and functionality supplies a good explanation even within the parameters of political realism. Initially the rules relating to airspace and outer space evolved quite quickly as aircraft and rockets became part of international life. So, too, did the law with respect to the continental shelf as its economic potential became apparent.

Until shortly after the end of the 19th century, customary rules comprised the bulk of accepted general international law. Many of the rules that originally governed such diverse areas as jurisdiction over territory, freedom of the high seas, the privileges and immunities of states and diplomats, the law of land warfare (*jus in bello*), and the rights of foreign citizens in other states have stemmed from customary practice. The requisite elements of custom as discussed in texts are as follows:

- Concordant practice by a number of states
- Continuation/repetition of the practice over a reasonable period of time
- A belief that the practice is required by, or consistent with, prevailing international law (*opinio juris*)
- General acquiescence in the practice by other states[26]

Several problems arise with this definition. The issues of how many states, how often, and how long form one obvious set of questions. A second asks, do all states count equally in terms of practice? Martti Koskenniemi's pointed query applies with special force to custom: "First, which group of States will be chosen as that whose behaviour, will, or interest are overruled? Second, how to justify that choice."[27] To some extent, answers to all depend both on the nature of the issue and the context, rather than an abstract specification of parameters. This points to two major factors that complicate the determination of a customary rule in the contemporary international system—the number of states, and the weight exerted by the opinion of each state. Determining a customary rule was much easier when the relevant opinions and practices involved those of less than 30 states instead of more than 190.

Power, interest, and sometimes technical capability can play a considerable role in developing and defining a customary rule. The practice of states with the greatest interest and most influence will have greater weight. While landlocked states such as Uganda and Bolivia might have a view on the management and control of fisheries, most states will look to the activities of states with large fishing industries—like Japan, Norway, Peru, the United Kingdom, and Russia—for evidence relating to practice. Treaties do not yet cover all areas of the law. Many states have refused to sign and/or ratify major lawmaking treaties. *If a lawmaking treaty presumably embodies a codification of customary law in an issue area, a nonmember state may still be considered bound by the preexisting customary practices*. This instance forms an exception to the rule that a treaty cannot bind a party that has refused to sign and ratify it.

Observed repeated practice by itself offers insufficient evidence that a rule of customary law exists. States must have indicated in some manner that their practice involved a *legally required duty* (*opinio juris*). Always keep in mind that determining a customary rule is not a science and that one can never determine a customary rule in an absolute sense. Although from time to time states have sought to establish rules for finding customary law, they have yet to decide on an authoritative method.[28]

A Note on the Relationship between Treaties and Custom

The movement to treaties in the 20th century represented by the conscious efforts to codify relevant practice illustrates the widespread dissatisfaction with custom as the basis for development and growth of international law. Nonetheless, the relationship between treaty law and customary law comprises a complex jigsaw puzzle. A rule might develop over the same time in both treaty and customary law. A new lawmaking treaty overrides an earlier conflicting rule of customary law unless the latter represents a rule of *jus cogens*. *Jus cogens* (peremptory norms) describe rules of customary law considered so fundamental and significant to the structure and functioning of the international community that they bind states even if the state has not given formal consent. Needless to say, the corollary is that states have no right to opt out or protest the application of these rules.[29] When a lawmaking treaty modifies or replaces a rule of customary international law, the changes in question affect, of course, only the states that have signed and ratified the agreement. In their relations with nonparty states, the old rules of customary law would still apply. Hence, a given rule of international law can be part of conventional law for some states (parties to a treaty) and part of customary international law for all other states. If a party to the treaty in question should withdraw, it would still be bound by the relevant rule of customary international law found in the lawmaking treaty.

This principle proved of great importance in *Nicaragua v. United States* (Merits).[30] The International Court of Justice first found that a U.S. reservation prevented the court from seizing jurisdiction over Nicaragua's claim based on violations of the UN and OAS Charters. But the court decided that it could apply customary international law rather than the conventional restraints found in the multilateral and bilateral treaties cited as at issue. The court held that merely because principles of customary and general international law had been codified or embodied in multilateral lawmaking conventions did not mean that those principles had ceased to exist. The principles still applied as rules of customary law even for countries that were states parties to such conventions.

Terminology: Law of War, Law of Armed Conflict, and International Humanitarian Law

Several different sets of regulations and laws apply to the soldier in the field. First and foremost are regulations and laws enacted by each state that govern the structure and operation of national military organizations. In the United States, the Uniform Code of Military Justice (UCMJ) states that the purpose of military law is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[31] In addition to the UCMJ, soldiers have responsibilities under the treaties and customs of war recognized by the United States. These comprise the law of armed conflict (LOIAC), international humanitarian law (IHL), and human rights law (HRL).

The terms "law of war," "law of armed conflict," and "international humanitarian law" tend to be used interchangeably. Previous chapters have also referred to rules of war. First note that rules of war differ from laws of war. A law is a formal rule that has a definite physical sanction attached to a violation: if you do the crime, you do the time. In contrast, a violation of a rule may or may not have a penalty, or the penalty might be seen as punishment administered in the hereafter. As discussed in chapter 2, one can point to rules for battlefield conduct in almost every historical era and area. Currently, every military operation, particularly UN peacekeeping missions, will have rules of engagement that will determine the nature of the missions. These are not laws but guidelines based on law as well as political objectives that establish the circumstances and limits to the use of deadly force. Individuals committing a violation will be subject to the military code of their own country. The *Law of Armed Conflict*

Deskbook, published by the Judge Advocate's Legal Center, states: "The purposes of the LOIAC include: (1) integrate humanity into war; (2) preserve the fundamental human rights of persons who fall into the hands of the enemy; and (3) assist in restoring the peace."[32] Given the international environment since World War II, the term "law of armed conflict" has largely replaced "law of war."

Finally, land warfare, aerial warfare, and maritime warfare have their own distinctive features. A recent commentary notes that, of the three domains, air warfare remains the least regulated by treaty law. No international treaty specifically addresses air warfare.[33] Advanced technology has made it possible to carry out operations over great distances but has also raised issues concerning the lack of regulation. In particular, in many instances airpower has become more important than "boots on the ground" for the United States since the Black Hawk Down incident in Somalia.

Treaties, Conventions, and Customary Law in U.S. Practice

Table 3.1 gives a list of the treaties and conventions relating to LOIAC and IHL that the United States considers binding law. Additionally, some HRL treaties such as the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment might come into play as well.

The United States has not ratified either of the two 1977 treaties that sought to update the 1949 Geneva Conventions—Protocol Additional I (PA-I) or Protocol Additional II (PA-II). The status of PA-I and PA-II with respect to U.S. ratification offers an interesting study in the relationship between custom and convention. The United States has decided not to ratify either of the treaties because of objections to a number of provisions that had much to do with the fallout from Vietnam. At this writing, PA-I has 174 ratifications/accessions; PA-II has 168. With the exception of Israel and Turkey, all other major military powers have adopted both conventions. In 1987, a deputy legal adviser to the State Department declared that the United States considered 59 of the substantive articles in PA-I to be declaratory of customary law, meaning that they apply across the board even if a state has not adopted the convention. The story becomes more involved. During the first Gulf War, and in other operations that involved allied forces, the United States found itself in a situation where its partners had accepted PA-I and PA-II and "the need to coordinate command and control issues, air operations, and rules of engagement within the coalition" forced the United States to operate within the provisions of the protocols.[34]

Every U.S. ally, with the exception of Israel and Turkey, has ratified the protocols, meaning that any combat operation involving an ally will in essence effectively bind the United States as well.[35] An interesting question then arises with respect to the provisions of the two conventions the

Table 3.1

Treaties and Conventions Relating to War Ratified by the United States

(1) Hague Convention No. III of 18 October 1907, Relative to the Opening of Hostilities (*36 Stat. 2259*, *Treaty Series 538*).

(2) Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land (*36 Stat. 2277; Treaty Series 539*), and the Annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land (*36 Stat. 2295; Treaty Series 539*).

(3) Hague Convention No. V of 18 October 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. (*36 Stat. 2310; Treaty Series 540*).

(4) Hague Convention No. IX of 18 October 1907, Concerning Bombardment by Naval Forces in Time of War (*36 Stat. 2351; Treaty Series 542*).

(5) Hague Convention No. X of 18 October 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (*36 Stat. 2371; Treaty Series No. 543*).

(6) Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929 (*47 Stat. 2021; Treaty Series 846*).

(7) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 27 July 1929 (*47 Stat. 2074; Treaty Series 847*),

(8) Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 15 April 1985 (*49 Stat. 3267; Treaty Series 899*), Only the United States and a number of the American Republics are parties to this treaty.

(9) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (*T. I. A. S. 3362*).

(10) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (*T. I. A. S. 3363*).

(11) Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (*T. I. A. S. 3364*).

(12) Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (*T. I. A. S. 3365*).

(13) Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 entered into force for the United States April 10, 1975. 26 UST 571; TIAS 8061; 94 LNTS 65.

Source: FM27-10: *The Law of Land Warfare*, Section I.5

United States does not consider part of customary law. Does U.S. acquiescence and observance then provide evidence that could be used to argue that all of the convention has now become declaratory of customary law? The short answer is no because mere observance without indication that a state feels legally obligated to do so (*opinio juris*) does not count as evidence that would convert a practice into a customary legal obligation. Nor has anyone asserted that the practice of nonstates parties that might correspond to the obligations involving PA-I and PA-II has generated customary norms of *jus cogens*. Welcome to the weird world of international law and practice.

Domestic Legislation

In addition to the law embodied in the international legal regime, soldiers will be subject to the regulations established by the military code of their own country. As stated earlier, the 1949 Geneva Conventions required passage of appropriate domestic law as a condition for ratification. In the United States, the Uniform Code of Military Justice applies to all personnel serving in the armed forces of the United States.[36] *Because the UCMJ incorporates the treaty law described in the last section, a U.S. soldier suspected of committing a violation would be charged with a violation of the UCMJ, not of the corresponding treaty provision.* A member of the U.S. armed forces charged with a violation would be tried by U.S. court-martial.

The question arises, what about civilians associated in some way with the U.S. military? Because courts-martial were originally viewed as instruments of the executive to be used as "tools of discipline," they do not provide defendants with the same procedural safeguards required by civil courts. The UCMJ courts were created as Article I courts under the Constitution, while civilians have the right to a hearing before an Article III court.[37] In particular, the UCMJ does not require either a grand jury indictment or a trial by a jury of peers before an independent judge. In part because these procedural safeguards are lacking, the Supreme Court has limited the extent to which civilians may be prosecuted in courts-martial. In 1957, a landmark Supreme Court decision, *Reid v. Covert*, held that because the U.S. Constitution applied to U.S. citizens when overseas, military courts had no jurisdiction to try U.S. citizen civilians, even if the crime occurred on a military base.[38] The questions in this case encompassed a number of complex issues that involved the relationship between executive agreements and treaties, the authority of the Congress to legislate, the territorial reach of the U.S. Constitution, and the fact that the offense occurred during a time of peace. We shall revisit some of these in the discussion of the status of prisoners at Guantanamo Bay.

The second gap in U.S. law involved the limited jurisdiction of the UCMJ. The UCMJ did not apply to soldiers after they completed their terms of service and returned to civilian life. Although presumably the 1996 War Crimes Act should apply, the Congress amended the UCMJ in 2006 to provide court-martial jurisdiction over former armed service personnel suspected of having committed a serious offense while on active duty. The expanded jurisdiction applies only to former service members who have not completed their full service commitment. Active duty enlistments are usually followed by a contractual period of reserve duty. Under the revision, former service personnel remain liable to recall to active duty under extraordinary circumstances. Accusations involving war crimes would constitute an extraordinary circumstance.[39]

WHAT IS A WAR CRIME?

Historically, prosecution for war crimes remained purely a domestic issue because, until Nuremberg, no international tribunal existed that had jurisdiction over individuals. States, not individuals, were considered to be the subjects of international law. Needless to say, war or armed conflict suspends ordinary rules of conduct. Individuals may not be punished for lawful acts of war. Hence, killing within the appropriate context is not a crime. The law of war encompasses crimes, war crimes, and "grave breaches." The 1949 Geneva Conventions introduced the phrase, requiring states to enact legislation to punish not war crimes but *grave breaches*. Generally, a war crime is any act for which soldiers or other individuals may be punished by the enemy on capture of the offender. The category includes acts committed in violation of international law and the laws of the combatant's own country as well as acts in violation of the laws of war undertaken *by order* and in the interest of the combatant's state of nationality. Note a simple fact: Some wartime violations of law, even those involving atrocities, can result from fits of anger at what soldiers believe has occurred. Others happen because of simple mistakes.

Legitimate acts of war carried out by lawful combatants cannot be the subject of criminal prosecutions if a lawful combatant is captured or rendered *hors de combat*. War crimes do not encompass violations of internal disciplinary rules and regulations nor of specific rules of engagement (ROEs) unless the violation involves a breach of the conventional and customary laws and practices of war, such as a large number of civilian deaths. Being absent without leave (AWOL), for example, involves a matter of internal discipline, not an offense against the laws and practices of war. An understanding of the application of two key concepts, *the role of status* and *the principle of distinction*, will clarify the difference between legitimate actions in war and a war crime.

With that being said, note that the U.S. Uniform Code of Military Justice incorporates the provisions of IHL ratified by the United States.[40] This situation flows from the fact that when the United States ratifies a treaty, the treaty provisions become part of federal law on par with statutes duly enacted through the domestic political process. To illustrate, Gary Solis informs us that "no Marine was charged with the commission of a war crime, as such, in Vietnam. Rather, *any 'violation of the law of war' committed* *by a Marine against a Vietnamese was charged as a violation of the UCMJ.* For example, the murder of a civilian noncombatant was charged as a violation of Article 118, murder, rather than as a war crime in violation of the Geneva or Hague conventions (1956 FM 27–10 [Change No. 1 1976] §507b0)."[41] Article 18.19.3.1 of the 2015 Department of Defense (DOD) *Law of War Manual* identifies those subject to trial for violations: members of a regular component of the U.S. armed forces; POWs in the custody of the U.S. armed forces; in time of declared war or contingency operations, persons serving with or accompanying an armed force in the field; and individuals belonging to one of the eight categories enumerated in Article 4 of the 1949 Geneva Convention III who violate the law of war.[42]

Questions of Jurisdiction

International law recognizes five principles that states may use to assert jurisdiction over individuals. In order of importance these are: territorial, national (active personality), protective, passive personality, and universality. Obviously states have a right to control events that occur in their territory regardless of the nationality of persons involved. *If they choose to do so*, states have the right to assert control over the behavior of their nationals wherever they might be. The United States makes comparatively little use of the nationality principle, perhaps because the rather stringent trial requirements in the Constitution would make prosecution for offenses committed overseas rather difficult and expensive. In contrast, French citizens remain subject to almost the entirety of the French legal code no matter where they are.

The protective principle permits legislation to deal with potential threats to national interests that occur outside of a country's territory but which could have a detrimental impact within it. One example would be a counterfeiting operation that sets up shop in Canada to print U.S. dollars.

Passive personality permits jurisdiction if the *victim* of a crime was a national. States that use this principle normally do so only for very serious crimes. Israel, for example, adopted the principle after the 1972 massacre of their Olympic athletes at Munich. After resisting the principle as a valid ground, beginning in the mid-1980s the United States slowly began to recognize passive personality as a useful tool in the struggle against terrorism.[43]

Universality, the last principle, has a special applicability to war crimes. An ICRC commentary states:

> Under the relevant article of each Convention (Arts 49, 50, 129 and 146, respectively), States are required to search for alleged offenders "regardless of their nationality," and either bring them before their own courts or hand them over for trial by another State Party which has made out a *prima facie* case. While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the

> place of the offence, they have generally been interpreted as providing for mandatory universal jurisdiction. Reflected through the formula *aut dedere aut judicare*, States have no choice but to prosecute or to extradite those who have allegedly committed grave breaches.[44]

Note here that the grant extends only to *grave breaches* as defined in the conventions, not to all war crimes.

Thresholds and Contexts

Four important observations apply here.[45] First, for IHL to apply, one must first determine that an armed conflict exists. Do hostilities between states require a certain level of intensity and protracted time frame before IHL applies, or does it apply to any resort to force between states? Opinion remains divided on this issue. No clear guidelines with respect to defining specific threshold conditions for *international* armed conflict have emerged from the practice of the ad hoc tribunals. Prosecutors have treated the issue as an evidentiary one specific to each individual case.[46]

Second, to what extent do the rules applicable to international armed conflicts apply to internal armed conflicts? Here we see an interesting evolution. While Geneva PA-II significantly extended the regulations applicable to internal armed conflict, many questioned whether the law of war crimes applied. The early 1990s witnessed an upsurge in internal conflicts. As discussed in earlier chapters, these often had severe consequences for surrounding states. In drafting the ICTR Statute, the Security Council had to deal expressly with the question of war crimes and internal armed conflict. It did so by directly incorporating Common Article 3 of the Geneva Conventions and most of the provisions of PA-II directly into the statute.[47] Shortly after, the ICTY Appeals Chamber in the *Tadić* case took the issue head-on, suggesting that a number of rules and principles (including Common Article 3) applied to internal conflicts.[48] The Rome Statute of the ICC explicitly identified and incorporated some core rules, indicating some convergence between the two regimes.

Third, the question of distinguishing an internal conflict where the rules would apply from a riot or other relatively minor disorders remains an open question. Authorities agree that time (conflict is of a protracted nature), intensity, and level of organization are the essential criteria.[49] Many other technical questions not germane to this discussion remain. For our purposes, taking note of the question and potential problems inherent in it will suffice.

Fourth, not all crimes committed during an armed conflict are war crimes. The criminal conduct *must be not only within the context but associated with the conflict*.[50] Ordinary crimes remain ordinary crimes to be prosecuted by local authorities if they do not meet both criteria. A rape or murder committed by a civilian against another civilian within the geographic and temporal area of a conflict does not necessarily constitute a war crime. *To assess the nature of the crime, one must take into account the status of the perpetrator, the status of the victim, and the purpose of the act*.[51]

Crimes and Sanctions

Current ideas about the nature of war crimes represent a striking departure from traditional legal attitudes toward the subject. For many years, offenses against the laws of war constituted crimes under the municipal law of belligerents, not under international law.[52] The defenses of "act of state" and superior orders conditioned prosecutions for war crimes because they served as appropriate defense responses to allegations of misconduct. The *municipal* character of penal offenses against the laws of war was also based on the orthodox belief that international law put obligations directly on individuals as subjects. As a body of law, IHL contains large numbers of technical and administrative regulations. For example, many articles in Geneva III pertain to food, sanitary facilities, clothing, and general living conditions. Insisting that minor violations of these technical and administrative provisions give rise to criminal liability makes little sense. It would be similar to asserting that minor violations of speed limits or traffic regulations should carry major penal sanctions in the form of jail time.

For violations to be considered crimes rather than minor instances of noncompliance, they must involve a certain degree of seriousness in terms of consequences flowing from noncompliance. The question thus arises: What is it that makes conduct a serious violation so that it is a war crime? Violations of the laws and customs of war are considered serious if (a) they endanger protected persons or objects or they breach important values; and (b) they are committed willfully—in the sense of intentionally or in reckless disregard of their outcome as endangering protected persons or objects or their breach of important values. The former is the *actus reus* of the crime and latter is the *mens rea*.[53]

Contextual factors play an important role. Depriving POWs of soap and toilet paper form minor violations of the regulations concerning the handling of POWs; the abusive treatment of Senator John McCain and his fellow POWs in North Vietnam constitute grave breaches. The Appeals Chamber early in the *Tadić* case used the twin tests of "basic values" of international humanitarian law and "consequences for the victim(s)" of particular actions:

> Article 4 of Geneva Convention IV, if interpreted in light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Geneva

Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves.[54]

This decision became the defining precedent for all cases following. The *Tadić* decision also dealt with one other evolutionary change. The Chamber held that many elements of the law, both customary and treaty derived, applied to internal conflicts (civil wars) of a large scale and protracted nature as well as to those that have an international character.

Antonio Cassese identified five categories of war crimes:[55]

1. Crimes committed against persons either not taking part or no longer taking part in hostilities—impermissible actions toward enemy civilians or POWs
2. Crimes against enemy combatants or civilians through resort to impermissible tactics of warfare—attacks against civilians meant to create terror, attacks directed at the sick and wounded, intentional starvation, torture, indiscriminate bombings, and the taking of hostages
3. Crimes against enemy combatants or civilians through resort to impermissible means of warfare—poison gas, dumdum bullets
4. Crimes against specially protected individuals or objects: medical personnel, hospitals, ICRC (or Red Crescent) personnel
5. Crimes involving the improper use of flags, ensigns, or other emblems—abuse of a flag of truce or of the ICRC (or Red Crescent) (i.e., using them as a ruse or trap)

To reiterate an earlier point, the conventions apply not only to cases of declared war but also to all other armed conflicts that might arise between two or more of the contracting parties, even if the existence of a state of war is not recognized by either of them. Moreover, there are offenses under international criminal law that are not included: genocide, crimes against humanity, and crimes against peace.

We must keep in mind another point made earlier and essential to understanding the complexities of "who can lawfully be killed." One of the essential elements in defining a crime is the status of individuals at the time of their act(s). Lawful combatants may willfully kill other lawful combatants. They may not kill or otherwise mistreat noncombatants or use unlawful means in accomplishing their missions. Civilians may die as an incidental consequence of lawfully conducted military operations (the unfortunate term "collateral damage"), but this will not create liability for those involved. While the principle of noncombatant immunity stands at the heart of IHL, the additional requirements of purpose and intent serve to circumscribe it. For civilian/noncombatant casualties to engage personal liability, a prosecutor would have to prove that the civilians were deliberately targeted, not just in the wrong place at the wrong time.

Evolution

Perhaps the most significant addition to the list of war crimes has occurred with the recognition of all forms of sexual violence as war crimes. In one sense, this does not represent an evolution. The progress stems from the willingness to prosecute rather than ignore. For example, Article 27 of Geneva IV stipulates that women should be protected, but it does not then define "rape" as a grave breach in the manner of other crimes. The statutes of the ad hoc tribunals did not explicitly list any sexual crimes, but the courts did eventually address the issue. The ICC Statute includes a list of sexual crimes: rape, sexual slavery, and enforced prostitution among others.[56]

CONVENTIONS AND BASIC PRINCIPLES

In essence, context constitutes the most important element because the application of all principles intimately depends on context, the nature of the conflict: is it international or noninternational? The second then becomes the status of individuals involved in the conflict: what can they lawfully do, what may they not do, and to what rights and protections are they entitled if captured? Solis describes the essential elements of application as the nature of the conflict, individual status, and the nature of the event.[57] The basic principles that apply to IHL can be summarized in five categories: distinction (discrimination), military necessity, proportionality, humanity (avoidance of unnecessary suffering), and command responsibility. Many commentators list the first four, and some list more than four. I have chosen command responsibility as a fifth complementary principle because it forms a vital element in the first four in many cases.

The fundamental question underlying the application of the principles of IHL is, *given the context of a specific conflict situation*, did the behavior/action meet a standard of reasonable conduct within the parameters that define the principles. The extraordinary nature of the context, armed conflict, means that actions that cause a great deal of damage and death might stretch ideas of reasonableness to their ultimate limits. In particular, the conditions under which troops find themselves in many contemporary conflicts mean that they are always working in situations of incomplete information where the conditions that might permit precise evaluations based on IHL principles do not exist. This situation alone stretches all definitions of "reasonable in context" while not justifying every seeming violation.

Distinction

The principle of distinction has two essential components: one relates to individuals, the other to property. To spare civilians and civilian property requires that one can clearly distinguish them from combatants and military objectives. The emergence of noncombatant immunity forms one of the more interesting developments in LOIAC. It began to emerge in the late 16th century, received great support after the horrors of the Thirty Years' War, and flowered in the relatively limited wars of the 18th and 19th centuries. Note, however that prior to the late 19th century, unless civilians were in an actual combat zone, tactics linked to the limited range and accuracy of weapons functioned to reduce the possibilities of civilians becoming targets in military actions. Observers having a picnic on the bluff above the battlefield watched the charge of the light brigade in the Crimean War (1854).[58] In the first battle at Manassas in the American Civil War, a large number of "war tourists" had made the trek out from Washington to watch the day's battle, ending with a very hasty exodus when the Southerners broke through the Union line. A Park Services narrative describes the scene:

> The federal retreat rapidly deteriorated as narrow bridges, overturned wagons, and heavy artillery fire added to the confusion. The calamitous retreat was further impeded by the hordes of fleeing onlookers who had come down from Washington to enjoy the spectacle.[59]

The two world wars in the 20th century witnessed almost a total erosion of restraints on civilian attacks. In World War II, the open city air raids alone, culminating in the fire bomb attacks on Tokyo, Hamburg and Dresden, and the destruction of Hiroshima and Nagasaki by atomic bombs, seemed to mark a reversion to earlier times when civilians often bore the consequences of soldiers foraging for provisions and seeking plunder. Rupert Smith, a World War II British general, wrote: "The paradigm of interstate industrial war took the people as its target . . . [T]he Second World War removed forever the sanctity of the non-combatant."[60] This has not been the case, but the conditions accompanying noninternational wars have made applying the principal of distinction more difficult.

Civilians and Combatants

Although the principle of distinction between civilians and soldiers had been acknowledged as part of customary law, until Geneva PA-I (1977), no treaty explicitly stated the obligation. The goal of IHL is to limit the conflict as far as possible, given the pragmatic push of military necessity, to combat between the legitimate combatants of the belligerent parties. Article 48 of PA-I specifically lays out the obligation:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.

In the types of contemporary conflicts that have emerged, this is often not an easy distinction to make. In technical terms, this is a dichotomous distinction—one is a civilian or one is not. If civilians participate in any way in combat operations, they lose their status and protection as civilians. One cannot be a civilian and a combatant, nor can one freely shift identity from one to the other. Article 51.3 of PA-I states that "civilians shall enjoy the protection afforded by the Section, unless and for such time as they take a direct part in hostilities."

Pretending to be a civilian while participating in hostilities deprives the individual of combatant/POW status if captured. Ambiguity permeates because under certain circumstances civilians will become "collateral damage" if working in a legitimate military target. Nonetheless, one cannot target a specific civilian just because he or she works in a ministry that contributes to the war effort. This reinforces the earlier observation about why specific context forms an important consideration. In addition to civilians, medical, religious, and civil defense personnel of the armed forces, and those who are wounded or otherwise incapacitated cannot be specifically targeted. In sum, if individuals do not directly participate in hostilities, they enjoy immunity from attack, even if such attack would result in a military advantage.

Lawful Combatants

Article 43 of PA-I defines lawful combatants:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, "inter alia," shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

This still leaves open the question of how one distinguishes a lawful combatant from a civilian. The provisions of Article I of Hague IV as slightly embellished by Article 4(A) of Geneva III define the basic requirements:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.
5. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Obviously, the questions today follow from the fact that guerilla movements and other nonstate actors do not observe the obligations in Article 4(A), sections 2, 3, and often 4. Their tactics depend on deception, stealth, and secrecy so that decisions by opposing forces have to be made on the basis of suspicious actions. This can result in tragedies from mistaken identity. Major Geoffrey Corn wrote about Somalia: "Faced with a hostile force that was virtually indistinguishable from the local civilian population, United States forces continued to attempt to make distinctions between lawful and unlawful targets based on the distinguishing factors available, which often amounted to little more than identifying a hostile act directed towards United States forces."[61] During the events in Mogadishu surrounding the crash of a Black Hawk helicopter and the capture of its pilot, Mark Bowden recorded the actions of one of the Rangers in the evacuation:

> Nelson found himself in a Humvee that had four full cans of 60 ammo [M-60 machine gun], so he worked his pig the whole way out of the city, shooting at anybody he saw. If they were on the street and he saw them he shot at them. He was close to coming out of this mess alive, and he was doing everything he could to make sure he did.[62]

Considering Major Corn's characterization of the context cited above, the action did not constitute a violation of the duty of distinction but a reasonable action given the circumstances.

Civilian Property and Military Objectives

Despite the emergence of the idea that the strategy and tactics in war should be solely directed toward defeating enemy forces, the concept of "military objective" remained an inchoate idea until after World War I. First mentioned in the 1923 Hague Rules of Air Warfare, it was incorporated into the 1949 Geneva Conventions but remained without a precise definition until Geneva PA-I (1977).[63] Article 52(2) of PA-I states:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.

Article 57(2)(a)(i) of PA-I mandates that those who plan or decide on an attack must "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them." Some controversy surrounds the definition because it does not provide a list of examples even as illustration to give practical guidance for such verification.[64] Nonetheless, despite its presumptive deficiencies, the definition has been incorporated verbatim into several other treaties.

Military Necessity

Historians attribute the first formulation of the idea of military necessity as a core principle to Francis Lieber. Lieber defined military necessity as consisting "in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[65] As such, it is intimately linked to the principles of proportionality and humanity. Yoram Dinstein writes that IHL in its entirety is "predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations."[66] No legal provisions can take suffering out of war. IHL tries to insert a balance between the "technical limits at which the necessities of war ought to yield to the requirements of humanity."[67] The ICTY in the *Galić* case summarized the principle:

> In its broad sense, military necessity means "doing what is necessary to achieve a war aim" . . . The principle of military necessity acknowledges the potential for unavoidable civilian death and injury ancillary to the conduct of legitimate military operations. However, this principle requires that destroying a particular military objective will provide some type of advantage in weakening the enemy military forces. Under no circumstance are civilians to be considered legitimate military targets. Consequently, attacking civilians or the civilian population as such cannot be justified by invoking military necessity.[68]

Three factors presumably limit the free exercise of military necessity. First, any attack must have a military purpose in that it must be intended and directly connected to the military defeat of the enemy (a military objective), not toward achieving a political goal. Justification rests primarily on the requirement that destroying a particular military objective will provide some type of advantage in weakening enemy forces. Second, an element of proportionality enters in that even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated. Third, military necessity cannot justify violation of the other rules of IHL.

As emphasized earlier, the idea that purpose must govern limits highlights the difference between military necessity and "military convenience."

Solis suggests a simple operational test to determine the reasonableness in context of an action taken: would two reasonably prudent commanders acting in conformance with LOIAC/IHL, with the information available to them at the time, have acted in similar fashion?[69]

Humanity (Unnecessary Suffering): Controlling Weapons

This principle has at its core the nature of weapons and their impact on combatants and potential effects on civilians. Article 35(2) of PA-I (1977) states: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." The terms in the article themselves generate many questions, but note that the prohibition covers both the types of weapons used and their actual method of employment during hostilities.

We find few such attempts at prohibition in the historical record. Canon Number 29, issued by the Second Lateran Council in 1139 AD, declared: "We prohibit under anathema that murderous art of crossbowmen and archers, which is hateful to God, to be employed against Christians and Catholics from now on."[70] Often cited, it stands in isolation as a response to what many saw as an outrage—the weapons enabled commoners to slay their betters at a distance, undermining the ideals of valor in personal combat embodied in the code of chivalry. The papacy itself had to ignore the ban in order to field an army capable of maintaining its own against competitors.[71]

Not until the industrial age in the latter half of the 19th century did concern for the welfare of the wounded meld with the idea that technology could make warfare more humane to produce a movement toward limiting or banning the use of certain weapons. The St. Petersburg Declaration (1868) on explosive projectiles stated:

> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity.[72]

This treaty lays out two fundamental elements that define unnecessary suffering: (1) attacks must be limited to weakening, not annihilating, the forces of the enemy; (2) any weapon that aggravates suffering or renders inevitable death from wounds inflicted is contrary to the laws of humanity. These two elements still form the basis of contemporary weapons law. The first obviously flows from the principle of distinction in that civilians cannot form the object of attack, so that weapons that cannot discriminate between civilian and military targets are prohibited. The second requires some additional elaboration because it contains what seems to be close to an absurd requirement considering the nature of wounds suffered from modern weapons.

Article 23(e) of The Hague Conventions of 1899 (Hague II) and 1907 (Hague IV) gives some guidance in that it forbade the employment of "*des armes, des projectiles ou des matières propres à cause des maux superflus*."[73] Interestingly, despite the fact that the original (and authentic) French text was repeated verbatim in both treaties, the official (authentic) English translation of this article changed with the publication of the 1907 text:

> 1899: To employ arms, projectiles, or materials of a nature to cause superfluous injury.
> 1907: To employ arms, projectiles, or material *calculated* to cause *unnecessary suffering*.

The alteration would not seem to make much difference, but it represents an interesting lesson in law and treaty interpretation in terms of reconciling the provisions of treaties that have authentic texts in several languages. The 1907 change to "calculated" from "of a nature" *moved the emphasis from the nature of the weapon to the intent of those employing the weapon*. Interestingly, the language in Article 35(2) of PA-I reverts to the 1899 text, not the 1907, again placing emphasis on the objective nature of the weapon.

In its advisory opinion on the legality or threat of use of nuclear weapons (1996), the International Court of Justice sought to clarify these provisions. The court identified the two elements above as "cardinal principles" well established in customary and treaty law, noting that "states do not have unlimited freedom of choice of means in the weapons they use."[74] The open question involves the definition of "superfluous" or "unnecessary" with respect to injury. The ICJ determined that unnecessary suffering to combatants meant "a harm greater than that unavoidable to achieve legitimate military objectives."[75] Still, just because a weapon inflicts great injury does not thereby make it illegal. Context governs. Dinstein emphasizes that the necessary calculation focuses on the distinction between avoidable and unavoidable suffering:

> This requires comparison between the weapons in question and other options. Two issues arise in particular: (a) whether an alternative weapon is available, causing less injury or suffering; and, . . . (b) whether the effects produced by the alternative weapon are sufficiently effective in neutralizing enemy personnel.[76]

From the St. Petersburg Declaration onward, the legal yardstick has been geared to determining what is necessary to disable a soldier or put him *hors de combat* (out of action).[77] The incongruity here stems from the fact that while it would be generally lawful to kill combatants, it would be unlawful to inflict injuries or suffering beyond what is necessary to render them *hors de combat*. Leo Gross argues that the standard is that one should not harm a combatant in a way that results in permanent disability because that violates "his right to return home as whole as possible once the conflict has ended."[78]

The *Weapons Law Encyclopedia* identifies three criteria used to assess the level of suffering: the intensity of the pain, the degree of permanent disability, and the likelihood of death. In addition, suffering includes psychological elements.[79] State practice tends to consider death as an effect of weapons within the scope of the general prohibition on superfluous injury or unnecessary suffering rather than as a separate, autonomous rule. Hence, the principle of superfluous injury or unnecessary suffering cannot be reduced simply to the question of the likelihood or certainty of death. Suffering as a sole criterion does not provide sufficient guidance necessary for the development of compelling standards for approving or banning a weapon. A weapon is deemed cruel and inhumane not because it can cause great suffering but because it can cause great suffering without producing any consequent advantage to those using it. The lawfulness of a weapon relates to its purpose and expected normal use, not to effects if used in an improper way.

Although considered a fundamental principle, the exact parameters of definition remain moot. Questions concerning the effects of small-caliber, high-velocity weapons, for example, have been debated for at least four decades. The legality of the M-16 rifle has been challenged on the grounds that the .223 (.556 mm) ammunition tumbles end over end, producing a wound similar to that made by expanding or exploding missiles. Many have argued that the M-16 does not create wounds any different from that made by an AK-47 or similar weapons.[80] Other weapons, such as the combat shotgun, have raised the question of whether the weapon causes excessive injuries without providing any particular advantage over existing weapons and ammunition.[81]

Prohibited Weapons

Rather than continuing to explore the rather elusive terms of definition, a catalog of prohibited weapons and tactics might help to clarify the abstract discussion. Lists generally include the following weapons: lances or spears with a barbed head; serrated-edged bayonets; expanding bullets; explosive bullets; poison and poisoned weapons, including projectiles smeared with substances that inflame wounds; biological and chemical weapons; weapons that primarily injure by fragments not detectable by X-ray, including projectiles filled with broken glass; certain booby traps; antipersonnel land mines; incendiary weapons; blinding laser weapons; and nuclear weapons. Table 3.2 contains a description of the major conventions governing weapons and the number of ratifications for each.

Table 3.2

Prohibited Weapons

Weapon	**Treaty**
Explosive projectiles weighing less than 400 grams	Declaration of Saint Petersburg (1868)*
Bullets that expand or flatten in the human body	Hague Declaration (1899)*
Poison and poisoned weapons	Hague Regulations (1907)*
Chemical weapons	Geneva Protocol (1925)*
	Convention on the prohibition of chemical weapons (1993)—190 State Parties*
Biological weapons	Geneva Protocol (1925)
	Convention on the prohibition of biological weapons (1972)—172 State Parties
Weapons that injure by fragments which, in the human body, escape detection by X-rays	Protocol I (1980) to the Convention on Certain Conventional Weapons—115 State Parties
Incendiary weapons	Protocol III (1980) to the Convention on Certain Conventional Weapons—111 State Parties
Blinding laser weapons	Protocol IV (1995) to the Convention on Certain Conventional Weapons—104 State Parties
Mines, booby traps and "other devices"	Protocol II, as amended (1996), to the Convention on Certain Conventional Weapons—102 State Parties
Anti-personnel mines	Convention on the Prohibition of Anti-Personnel Mines (Ottawa Treaty) (1997)—162 State Parties
Explosive Remnants of War	Protocol V (2003) to the Convention on Certain Conventional Weapons—87 State Parties
Cluster Munitions	Convention on Cluster Munitions (2008)—91 State Parties

Source: 18 U.S. Code § 2332a.
*Declaratory of customary international law

The list requires a major caveat because with respect to some weapons on the list, no broad consensus exists that would support the contention that under customary international law they would violate the rule prohibiting unnecessary suffering. Note that the list does specifically include a total ban on weapons of mass destruction (with the exception of nuclear weapons), although these are not identified by that generic term.[82]

Two categories need some additional commentary: incendiary devices and booby traps. Gross observes that "incendiary weapons highlight the ambivalence that nations have about weapons that cause extreme but useful suffering."[83] Incendiary weapons, simply described, are designed to use intense heat to set fire to military objects (use against civilians expressly prohibited), or to disable combatants quickly. Rule 85 of the ICRC 2005 Customary IHL Study says: "The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*." Article 2 of Protocol III of the Convention on Certain Conventional Weapons (CCW)[84] prohibits the use of aerial-delivered incendiary devices (e.g., napalm) against any military target located within a "concentration of civilians."[85]

This provision would prohibit the types of raids carried out against London, Hamburg, Dresden, and Tokyo during World War II. Going back to comments earlier in this chapter, one has to comprehend the idea of "reasonable in context" to comprehend the idea of "extreme but useful suffering" because otherwise everything becomes merely an exercise in justification ("lawfare") rather than one of assessment. Keep in mind, however, that any calculation presumably balances military necessity with the harm caused.

Booby traps per se are not illegal. Most of the restrictions on booby traps stem from concern about civilians. Article 7 of Protocol II of the CCW explicitly prohibits the use of booby traps against civilians.[86] The ban has three main elements: (1) anything "in the form of an apparently harmless portable object"; (2) booby traps attached to, or associated with animals, the sick and wounded (or corpses), objects of a religious nature, children's toys, food or drink, internationally recognized protective signs/emblems, or other sites and protected persons; and 3) booby traps designed to "cause superfluous injury or unnecessary suffering (Article 2)." The last provision would seem to outlaw the classic booby trap, the disguised pit with sharpened stakes, on the grounds that death would be slow and painful, thus causing unnecessary suffering.

Prohibited Tactics: Perfidy, Human Shields, Pillage/Looting, and Reprisals

The idea of *perfidy* again seems somewhat counterintuitive in that ruses and deception comprise legitimate tactics in armed conflict (PA-I, Article 37.2). Camouflage, the use of decoys, spreading misinformation (propaganda), or ruses designed to gather information about the enemy comprise legitimate forms of deception.[87] The rules of war distinguish between treachery and legitimate trickery. Consider the following example from Xenophon. After the defeat of the mercenary Greek army recruited to help Cyrus the Younger unseat his brother, the Persian king Artaxerxes II (401 BC), the satrap of Lydia, Tissaphernes, had a major problem on his hands—a large host of Greek soldiers who were in the middle of a hostile empire with no food and no employer. Tissaphernes befriended the leadership of the army, inviting them to a feast to discuss and resolve the problems that had arisen between them. The Greek generals agreed to meet. The generals were seized and eventually beheaded. Others who had accompanied them were killed.[88]

Article 37.1 of PA-I defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict with intent to betray that confidence." The deceit of Tissaphernes clearly violated an agreement for a truce to negotiate. The fact that it was an oral agreement, not a written one, made no difference. The Greek generals expected safe conduct.

Specifically, Article 37 of PA-I also states that it is "prohibited to kill, injure or capture an adversary by resort to perfidy." Actions specified are:

(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

Article 38 of PA-I specifically forbids the use of the red cross, red lion, red crescent, or other distinctive "protective" emblems and reiterates the prohibition on use of the "distinctive emblem of the United Nations." Article 39 of PA-I applies to the use of "flags, military emblems, insignia or uniforms of neutral states."[89]

Human Shields

The term "human shield" applies to attempts to protect troops or military objectives by deliberately placing civilians in the target area. One of the central problems of contemporary armed conflict stems from the deliberate use of the civilian population by belligerents as deterrents to attack. Article 28 of Geneva Convention IV (1949) says that the "presence of a protected person may not be used to render certain points or areas immune from military operations." The ICRC study on customary international humanitarian law in Rule 24 states that belligerents have the obligation to remove civilian persons and objects under its control from the vicinity of military objectives "to the extent feasible."[90] Several other treaties including PA-I also reiterate the obligation.[91] As Sandoz points out, the issues here do not arise from the use of human shields, which are not permissible under the principle of distinction, but from the "delicate matter" of military response.[92] Dinstein focuses on the crucial question—can "the brazen act of shielding a military objective with civilians (albeit a war crime)" effectively tie the hands of the enemy by barring an attack?[93] While Article 58 of PA-I states that the war crime of using human shields does not relieve a belligerent from the obligations toward civilians, their presence does not preclude lawful targeting as a legitimate objective. Response involves the question of proportionality and precaution discussed in the next section but also must meet the other requirements of IHL. The target must qualify as a military objective, meet the proportionality test with regard to loss of civilian life (that is, consideration of the potential harm to civilians against the direct and concrete military advantage of the attack), and involve means and methods that will cause the least incidental injury to civilians.[94]

A second issue occurs with the problem of voluntary human shields. Voluntary human shields take positive action to deter damage to objects or persons that make a positive military contribution. In doing so, they obviously contribute to military action; thus it becomes difficult to characterize their behavior as anything but direct participation. The questions relating to lawful response to this problem will be discussed in more detail later in chapter 8, on privileged and unprivileged combatants.

Pillage/Looting and Reprisals

Up to the advent of national standing armies and regular pay, the spoils of war from pillage and looting have historically been considered part of a soldier's reward. Article 47 of Hague IV (1907) says in simple terms, "Pillage is formally forbidden." The prohibition is repeated in Article 7 of the 1907 Hague IX (1907), which states: "A town or place, even when taken by storm, may not be pillaged." The prohibition concerns not only pillage through individual acts without the consent of the military authorities but also organized pillage, when the booty allocated to each soldier was considered as part of his pay.[95] Pillage and looting must be separated from "requisitioning," which has legal requirements that include payment for the goods. Requisitioning may occur only within occupied territories. Under Articles 52 and 55 of Geneva IV (1949), requisitioning must take into account the needs of the civilian population.

Reprisals consist of measures contrary to law in response to illegal acts by an enemy belligerent to compel cessation or obtain compensation. In the peculiar logic of international law, such acts become legal acts of enforcement considering the particular conditions under which they are undertaken.[96] This would be the case, for example, if a belligerent employed weapons forbidden by The Hague regulations to counter the use of the same weapons by his adversary. In 1874, the Brussels Conference, and in 1880, the Institute of International Law, emphasized the need for regulations to cover reprisals, "an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty." Reprisals against wounded, sick, or shipwrecked persons; medical or religious personnel; medical units; transports and material; prisoners of war; the civilian population and civilian persons; civilian objects; cultural property; objects indispensable to the survival of the civilian population; the natural environment; works and installations containing dangerous forces; and the buildings and material used for the protection of the civilian population are always prohibited.

The Principle of Proportionality

The principle of proportionality applies in both the *ius ad bellum* and the *ius in bello*. As noted earlier, the focus of this book is primarily on the *ius in bello*. To this point, the principle of proportionality has formed part of discussions about other principles and applications, the most obvious being military necessity. All should have an intuitive idea of what proportionality entails. Proportionality forms an essential requirement for any action that might involve civilians as "collateral damage." The difficulty becomes the indeterminate nature of the values placed on the scale to establish whether a result meets the specific test suggested by a rule. Enzo Cannizzaro begins his essay on the concept of proportionally by noting that it "has long been a mysterious topic in international law. Its critics have tended to highlight its inherent indeterminacy and the subjective character of its assessment."[97]

In short, how can the value of human lives be assessed in term of "things"? Despite the ambiguity, Cannizzaro notes that the principle of proportionality applies to "situations in which a number of different interests entitled to legal protection can be identified but cannot be *a priori* composed in a predetermined behavioural scheme."[98] In short, proportionality applies to rules that depend on factors whose "weight" can vary with the specific context. Considering the prior discussion in this chapter, it might be impossible to specify detailed legal rules that cover the almost infinite number of situations where a decision about appropriate military tactics and methods has to be made. Flawed as it might be, the very rough and vague ideas that define proportionality offer a way to regulate a broad spectrum of conduct with a few relatively simple rules.[99]

Two articles of PA-I (1977), Article 51.5(b) and Article 57.2(b) define proportionality for modern international conflicts. PA-II (noninternational conflicts, 1977) makes no reference to proportionality. Article 51.5(b) states that "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be *excessive* in relation to the concrete military advantage anticipated" (emphasis added). Article 57.2(b) requires that if an attack does not meet the standard specified in Article 51.b(2), it must be canceled or suspended. Although the term "excessive" forms the crucial test in both articles, PA-I does not contain a definition. That determination would seem to be left to any judicial forum that has to deal with the issues. Problems of definition issue will play a major role in discussions and examples in the chapters on specific areas and problems in IHL.

Command Responsibility

This topic is not normally included as a major principle. Yet, given the responsibilities of commanders, despite the obligations of foot soldiers in the field, they are responsible for making sure their subordinates are familiar with the rules of IHL, for planning and carrying out attacks, and for choices of weapons and tactics. The commander has a duty to stop all violations of IHL and to arrange for punishment of serious violations. In this respect, commanders have an interesting double responsibility in the sense that they have liability for acts of omission as well as acts of commission. The issues raised by commission are straightforward, defined by any grave breach of the first four principles.

The issue of omission becomes more difficult because it involves questions of war crimes committed by subordinates, perhaps in ignorance or in deliberate defiance of orders. In this case, the important consideration is the response of the commander. Command responsibility arises when the commander avoids taking action to prevent the crime from occurring or does not take appropriate action to punish those responsible. Perhaps because the crime here involves "dereliction of duty," it seldom constitutes a grave breach because commanders in this case are not held responsible for the original crime but for their own actions of omission. They do not incur "vicarious liability" for the acts of commission by their subordinates.[100]

A FINAL NOTE ON THE POLITICS OF PROTECTIVE EMBLEMS

Anyone familiar with the egoism of the state-centric politics of the 20th century will find the controversy over the demand by states to have their very own distinctive protective symbol for medical and other personnel rings a very familiar bell. The First Geneva Convention recognized the red cross on a white background as the single distinctive emblem. Since the emblem needed to reflect the neutrality of the medical services of all countries and the protection conferred on them, the adoptive emblem reversed the colors of the Swiss flag. During the war between Russia and Turkey, the Ottoman Empire declared that it would use the red crescent on a white background in place of the red cross. While respecting the red cross symbol, the Ottoman authorities believed that the red cross was, by its very nature, offensive to Muslim soldiers. The red crescent was temporarily accepted for the duration of this conflict. After the First World War, the 1929 Diplomatic Conference was called to revise the Geneva Conventions. The Turkish, Persian, and Egyptian delegations requested that the red crescent and the red lion and sun be recognized. After lengthy discussions, the conference agreed to recognize them as distinctive emblems in addition to the red cross; but in order to avoid any proliferation of emblems, it limited the authorization to the three countries that already used them.[101]

At the 1949 Geneva Conference, Israel proposed to add the red shield of David. Arab states resisted on the basis that the six-pointed star was a religious symbol. Solis observes that other emerging states proposed their own new protective emblems: Afghanistan proposed a red archway, India a red wheel, Lebanon a red cypress tree, Sudan a red rhinoceros, Zaire a red lamb, and Sri Lanka a red swastika.[102] A December 2005 conference in Geneva produced Protocol Additional III (PA-III) to the 1949 Geneva Conventions, which added the *red crystal*.[103] A state that opts to use the red crystal may add its own smaller emblem to the interior of the open diamond. The convention entered into force in January 2007. At this writing the convention has 70 states parties.

CHAPTER 4

Combatants and Civilians: Private Military Companies, POWs, and Unlawful Combatants

> Every soldier is a victim of the state that drafts him, sends him to war, and demands that he kill the enemy. However, at the same time, this soldier still bears responsibility for his actions as an aggressor or war criminal.
>
> —Yuki Tanaka[1]

PERSPECTIVE: THE IMPORTANCE OF HAVING STATUS—WHO CAN LAWFULLY KILL AND BE KILLED?

Michael Walzer makes an important point concerning arguments about war: even if one denies the value of just war theory, judgments about war inevitably involve two dimensions—one that assesses the validity of the cause and one that evaluates the means used in prosecuting the cause.[2] As discussed in chapter 3, after the determination of the type of conflict, whether international armed conflict (IAC) or noninternational armed conflict (NIAC), the distinction between combatants, certain exempt members of the armed forces (e.g., medical and religious personnel), and civilians forms the first principle of IHL. On the battlefield, everyone has a legal status: lawful combatant, civilian, exempt member of the armed forces, "unprivileged" (unlawful) combatant, or one taking part in the hostilities who does not meet the standards to be classified as a "lawful" combatant. Note here that the word "unprivileged" does not appear in any of the four Geneva Conventions (1949), nor does it appear in the two Additional Protocols (PA-I and PA-II, 1977).[3]

The attribution of status on the battlefield does not represent a trivial legal nitpicking exercise. *Status determines who can lawfully kill and be* *killed.* Particularly important for NIACs, it determines whether one faces a domestic trial for murder or enjoys prisoner-of-war status, which precludes trial for lawfully killing. Jean Pictet summarizes what having legal status means for those captured in hostilities:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such covered by the Third Convention, a civilian covered by the Fourth Convention, or again a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.[4]

The importance of being a lawful combatant lies in the simple fact that if captured by the enemy, a lawful combatant has a right to the "privileged" status of becoming a POW. Persons who have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 are not entitled to treatment either as peaceful civilians or as prisoners of war. The questions come from two problems—the debate over the rights, if any, of unlawful ("unprivileged") combatants, and application in the real world of active combat where battle conditions can create situations that result in blurring the distinctions in the law. Because of the nature of many contemporary IACs and NIACs, questions of distinction often pose an impossible burden on the soldier in the field who must make split-second decisions about the threat potential of situations.

Civilians[5]

Historically, because pillage and booty formed part of the rewards for serving as a soldier, civilians were fair game. Many instances exist, particularly after successful sieges, where the civilian inhabitants suffered the consequences of resistance. In his rant before the gates of Harfleur, Shakespeare has King Henry V give a graphic description of what will happen if the city does not surrender:

> If I begin the batt'ry once again
> I will not leave the half-achievèd Harfleur
> Till in her ashes she lie burièd.
> The gates of mercy shall be all shut up,
> And the fleshed soldier, rough and hard of heart,
> In liberty of bloody hands shall range
> With conscience wide as hell, mowing like grass
> Your free fair virgins, and your flow'ring infants . . . spitted upon pikes[6]

Of course, over time, the humanitarian impetus has been to isolate civilians from combatants. The contemporary fundamental principle of *distinction* (chapter 4) holds that civilians should never form the target of a direct attack. Civilians consist of two basic groups: (1) the population that has no *direct* participation in hostilities even though some of their activities, such as supplying food to the troops through farming, may contribute to the sustainability of the war effort, and (2) those persons providing *indirect* support by working in defense industries.

From the obverse perspective, civilians are those individuals who are not members of the armed forces to a party to the conflict. In a noninternational conflict, the term "civilian" means anyone who is not a member of a military organization. Civilian immunity is based on a very simple principle: they may not be directly targeted because they pose no immediate threat to the adversary. *If, however, they are in or around a legitimate military target, civilians implicitly assume the risk of death or injury as collateral damage from an attack.* In an international armed conflict, if persons participate directly in hostilities without being integrated into "membership" in an organized armed group, they lose their protected status during the time of direct participation. In sum, while these persons would forfeit their immunity from direct attack while participating in combat, they do so only for the length of time their participation lasts.

Unlike ordinary lawful combatants, once their involvement ends, civilians who have directly participated in hostilities are again immune from attack *but can still be tried and punished for their actions as a belligerent.*[7] Still, defining direct participation has taken some time and energy. At base, it refers to taking specific hostile acts aimed at the adversary. The ICRC commentary on PA-I defines direct participation as "acts of war which by the nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[8] Over time, this brief description proved somewhat inadequate to deal with the realities of contemporary warfare.

A May 2009 report commissioned by the ICRC attempted to provide additional guidance, adding three criteria to clarify the meaning of "direct participation."[9] An act must satisfy all three to qualify. First, the act must adversely affect the military operations of a party to the conflict, or inflict death, injury, or destruction on individuals and/or property excluded from direct attack. Second, a direct causal link must exist between the act and the harm. This extends participation to include war-sustaining activities that contribute in some direct way to the defeat of an opposing force. For example, working as a clerk in an armory does not qualify but driving a truck to deliver ammunition to troops engaged in fighting does. *Nonetheless, the clerk, although a civilian, assumes some risk by working in a place considered as a legitimate military target.* Financial contributions to support fighters might violate domestic laws but do not constitute enough of a *direct* connection to qualify as a violation of IHL. Third, the act must be specifically designed to cause harm to the enemy, meaning that it must result from specific intent. *An act of self-defense to protect oneself from harm from a belligerent attack does not constitute "direct participation"* although it may cause damage to the belligerent action.[10]

Shades of Status

The 1949 Geneva Conventions utilize the 1907 Hague definition of a lawful combatant. Lawful combatants are members of an organization commanded by a person responsible for subordinates and that conducts its operations in accordance with the laws of war. They must use a fixed distinctive sign recognizable at a distance and carry arms openly.[11] Note that citizenship does not form part of the definition. Being a lawful combatant only requires that an individual must be a member of an organized armed force. Many Americans joined the British and French armies prior to American entry into WWI, fought in the Spanish Civil War (1937–1939), and volunteered for service in the Canadian Air Force and British Royal Air Force prior to American entry in World War II. While they may have violated American neutrality law, they still had the status of lawful combatants as members of an organized military force. The current American army has a large number of permanent resident aliens who have volunteered to enlist.[12]

Note also that medical and religious personnel have a separate status. They are not considered combatants and thus are not considered legitimate targets at any time. Their status as members of a military organization, however, differs from that of civilian noncombatants in that their presence at a legitimate military objective makes no difference in terms of special precautionary measures. If captured, medical and military personnel become *retainees* rather than POWs. They cannot be compelled to work at tasks other than those associated with their medical or pastoral training. They may be assigned to provide medical care or religious counseling and care to POWs.[13] As *military noncombatants*, they cannot engage in hostilities except in self-defense and/or defense of the wounded. Solis notes that no authority exists for medics and chaplains to declare an exemption. If they do so, they become "unlawful" combatants, losing their immunity and "privilege" and becoming lawful targets.[14]

The importance of combatant status lies not only in the permissive license to kill other combatants but also in the liability attached because "combatants may be attacked at any time until they surrender or are otherwise hors de combat, and not only when actually threatening the enemy."[15] The dark side of combatant status stems from the fact that combatants become *continuing lawful targets* no matter where they are at any given time. During a state of war, a combatant is *always* at risk—that is, always a legitimate target—even if on leave in a locality totally unrelated to the areas where combat is actively occurring. Finally, POW status applies only to international armed conflicts. The law applicable in noninternational armed conflicts (LONIAC) does not foresee a combatant's privilege—that is, the right to participate in hostilities and have impunity for lawful acts of hostility.

Civilians Who Accompany the Armed Forces to Perform Special Tasks

In terms of ordinary crimes, the Military Extraterritorial Jurisdiction Act applies to certain felonies committed by civilians employed by or accompanying the armed forces abroad.[16] In terms of protection, if captured, Article 4A of GC III states: "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy." Article 4A(4) states that this includes

> persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

This would also apply to the members of private military companies (PMCs) and private security companies (PSCs) provided they are employed by the military forces of a country. International humanitarian law does not prescribe specific steps that must be taken by states in order for people to be registered in their armed forces under Article 4A(1) of GC III (1949) or under Article 43 of PA-I (1977). The requirements of form of registration fall solely under internal (domestic) law. Incorporation therefore depends on the internal legal regime of the state in question. However, it is clear that some form of official incorporation is necessary, especially since Article 43.3 of PA-I imposes a specific obligation on states that incorporate their own police forces or other paramilitary forces into their armed forces to inform the opposing side. This suggests that international humanitarian law anticipates that although it is a matter of domestic law as to how members of armed forces are recruited and registered within a state, the process must result in making their precise status clear to opposing forces.

The phenomenon of private contractors carrying out duties for the armed forces is not new. What has changed recently, however, is the level of outsourcing now taking place and the nature of the activities contracted out to private firms. In September 2007, the number of contractors in Iraq reached a one-to-one ratio with U.S. troops.[17] PMCs now perform many tasks previously carried out by the military itself. Peter Singer divides PMCs into three "business sectors": (1) military provider firms supplying "direct, tactical military assistance" that can include serving in front-line combat; (2) military consulting firms that provide strategic advice and training; and (3) military support forms that provide logistics, maintenance, and intelligence services to armed forces.[18] Michael Schmitt (2005) provides a laundry list of tasks PMCs performed in Iraq and Afghanistan:

> The scope of conflict-related activities which civilians perform today is unprecedented. Of greatest importance is their centrality to the complex logistics system that supports the Coalition armies. For instance, civilian contract employees drive the nearly seven hundred trucks that deliver supplies daily to the sixty military bases across Iraq. They also provide most of the combat service support (for example, feeding troops and maintaining billeting facilities). Closer to the fight, civilians maintain complex weapons systems such as the F-117 Nighthawk fighter, B-2 Spirit bomber, M1 Abrams tank, and TOW missile system, and operate the Global Hawk and Predator unmanned aerial vehicles ("UAV"). Civilians also conduct intelligence collection (especially with remote sensors) and analysis, although often from outside the area of operations. Contractors and government civilians have even interrogated prisoners of war and other detainees, regrettably participating in the now-infamous abuse incidents.[19]

Some questions arise because of a distinction between private security companies and private military companies. PSCs provide services aimed at protecting business and property from criminal activity. PSCs have existed for a very long time, but again their number seems to be on the increase especially in conflict regions, where businesses feel they cannot always rely on state security forces for their protection. Various documents emphasize the different functions of the two, and the distinction certainly reflects a reality of the market. Schmitt offers details:

> Private security companies ("PSCs") have even been protecting employees and facilities of the US government, other governments, and private companies. . . . Contractors provided personal security for Coalition Provisional Authority ("CPA") Administrator L. Paul Bremer, as they currently do for senior civilians and distinguished visitors. They also guard nonmilitary facilities at the Baghdad airport and inside the Green Zone, protect convoys, and shoulder the lion's share of training for the New Iraqi Army, paramilitary forces, and law enforcement organizations.[20]

With regard to international humanitarian law, however, the distinction of functions between PSC and PMC is not as clearly delineated as it might appear.[21] Being frequently active in countries where an armed conflict is ongoing, personnel of PSCs could become embroiled in armed confrontation. For instance, the facility for which they are providing security could be attacked and the personnel might return fire in such a case. In situations where contractors are providing security to civilian objects—such as schools, hospitals, and civilian houses—the situation appears relatively simple. An attack on such a facility would be illegal under humanitarian law, and personnel providing security to it are entitled to the protection afforded to civilians under humanitarian law. *The use of force by private contractors in self-defense or to protect other civilian persons or objects would not amount to direct participation in the hostilities.*

All things considered, present regulations may make it impossible for opposing forces to determine with some accuracy which PMC/PSC employees have combatant status and which are civilians and possibly even protected persons whose shooting or injury could constitute a grave breach of the Geneva Conventions. One must bear in mind that in Iraq there have been more than 100 different private military companies operating. The members of many of these wear uniforms and look very much like Article 4A(2) forces but may, in fact, be civilians.

PMCs and PSCs do not fit neatly into the traditional conceptual frameworks that structure the LOIAC, which relies heavily on territorial control and well-defined hierarchical command-and-control structures. Because PMCs and PSCs operate largely outside the traditional chain of command, it is often difficult to determine status, even for some members of the armed forces. The proliferation of parties with an ambiguous status in situations of armed conflict exacerbates the problem.[22] Add to this that many PMC personnel operate far from what has traditionally been thought of as the battlefield, "answering not to uniformed personnel but to contractor managers and private boards" responsible for executing the contract.[23]

DILEMMAS OF DETERMINING STATUS

On Sunday, September 16, 2007, a Blackwater convoy on contract for the State Department came to a halt at an intersection in Baghdad called Nisour Square. Operatives emerged from the four vehicles and opened fire on a perceived threat, killing 17 Iraqi civilians. After 15 months of investigation, the Justice Department charged six Blackwater operatives with voluntary manslaughter, stating the use of force was not only unjustified but unprovoked. An FBI investigation found that, of the 17 Iraqis killed by the guards, at least 14 were shot without cause.[24] The heightened focus on contracting quickly revealed that the model for employing contractors might be a ticking bomb. Analysis made it apparent that contractors operated in a haze of legal gray zones—no clear lines of responsibility and accountability existed. On October 2, 2007, the Democratic staff of the House Oversight and Government Reform Committee released a report stating that Blackwater USA guards had used deadly force weekly in Iraq and inflicted "significant casualties and property damage." The report found that the guards fired their weapons an average of 1.4 times a week.

Though Blackwater was authorized to use force only defensively (i.e., in self-defense), the report stated that *"the vast majority of Blackwater weapons discharges are pre-emptive, with Blackwater forces firing first at a vehicle or suspicious individual prior to receiving any fire."*[25]

On December 31, 2009, a U.S. district judge dismissed all charges on the grounds that the case against the Blackwater guards had been improperly built on testimony given in exchange for immunity. In April 2011, a U.S. federal appeals court reinstated the manslaughter charges against four of the guards after closed-door testimony, noting "the district court's findings depend on an erroneous view of the law."[26] Charges against a fifth guard were dismissed, and a sixth pled guilty to voluntary manslaughter and attempted manslaughter. On October 22, 2014, a federal district court jury convicted Nicholas Slatten of first-degree murder and three other guards on three counts of voluntary manslaughter and using a machine gun to commit a violent crime. Slatten received a life sentence while the other three were sentenced to 30 years.[27]

Note that this case stands out because it represents an exception rather than a rule. Without the push of a major political incentive to undertake the difficulties in conducting an effective extraterritorial investigation, states have little incentive to commit resources to a long and challenging case that will pay few dividends at home. Even when pushed to take on a case, investigators face major obstacles to obtaining relevant and reliable evidence.[28] They must deal with an unstable situation, the potential lack of cooperation from the state where the incident occurred, and witnesses who, for many reasons, might not be truthful or forthcoming. Add to this the problems of translation.

The important fact often overlooked was that these six operatives worked under a contract from the Department of State, not the Department of Defense. Their contract status with the Department of State did not qualify them as "associated with the armed forces," so if captured by enemy forces they would not have POW status under the LOIAC. The question not generally addressed but most pertinent to this discussion is what rights would the Blackwater personnel have had if they had fallen into enemy hands? The next section focuses on that issue.

Protected Persons and Unlawful/Unprivileged Combatants

The terms "combatant," "prisoner of war," and "civilian" are generally used and defined in the treaties of international humanitarian law. The terms "unlawful combatant" and "unprivileged combatant/belligerent" do not appear in them but have, however, been frequently used at least since the beginning of the last century in legal literature, military manuals, and case law. The connotations given to these terms and their consequences for the applicable protection regime are not always very clear. For clarification, the term “unlawful/unprivileged combatant/belligerent” encompasses all persons taking a direct part in hostilities in an international armed conflict without being entitled to do so and who therefore cannot be classified as prisoners of war upon falling into the power of the enemy.

So-called unprivileged belligerents still have the status of “protected persons” as defined in Article 45(3) of PA-I, which states that

> *any person who has taken part in hostilities, who is not entitled to prisoner-of-war status* and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. [emphasis added]

Article 4 of Geneva Convention IV (GC IV, Relative to the Protection of Civilian Persons in Time of War of August 12, 1949) defines protected persons as “those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals.” The Blackwater guards, if captured, would fall under these provisions. Article 4 also defines exceptions: “Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.” The critical requirements for treatment of protected persons stem from Article 5 of GC IV, and Article 75 of PA-I. Article 5 says, “In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.”

Although the United States has not ratified PA-I, other human rights treaties specify rights guaranteed to prisoners, however they might be characterized, and have gained the status of being part of the customary law and practice applicable to armed conflicts. Article 75.1 of PA-I states:

> In so far as they are affected by a situation referred to in Article 1 of this protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol *shall be treated humanely in all circumstances* and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction. [emphasis added]

Thus, the fact that a person has unlawfully participated in hostilities does not place him or her beyond the law in the sense of exclusion from the application of the requirements of GC IV and PA-I. Remember that every individual on the battlefield has a legal status. Indeed, Article 5 of GC-IV, which permits for some exceptions—under very strict conditions—from the protections of GC IV, uses the term "protected persons" with regard to individuals detained as *spies or saboteurs* as well as persons definitely suspected of, or engaged in, activities hostile to the security of the state or occupying power. Both the concepts of "activity hostile to the security of the State/Occupying Power" and of "sabotage" certainly encompass direct participation (without entitlement) in hostilities. Consequently, this article would apply in particular to persons who do not fulfil the criteria for legal status under GC I–III.

THE UNITED STATES AND "UNLAWFUL" COMBATANTS

Since 9/11, the United States has held a number of suspected terrorists without charges and without access to attorneys or courts.[29] Much of the controversy involves the legal status of individuals captured in Afghanistan who fought for the Taliban and/or were associated with al Qaeda. The legal issues have had as much to do with American constitutional law as with IHL. Even so, the stance of the Bush administration was simple—because they were unlawful combatants, they had forfeited all rights—none of the Geneva Conventions applied. Secretary of Defense Donald Rumsfeld stated that the United States would treat the detainees humanely as a matter of policy but denied any *legal* obligation to do so.[30] The U.S. attorney in the *Hamdi v. Rumsfeld* case, Paul J. McNulty, stated, "It is well-settled that the military has the authority to capture and detain individuals whom it has determined are enemy combatants" and that such combatants "have no right of access to counsel to challenge their detention."[31]

The *Hamdi* case involved Yasser Esam Hamdi, a 21-year-old detainee captured on the battlefield in Afghanistan. The government had characterized Hamdi, who was born in Louisiana but reared in Saudi Arabia, as an "enemy combatant" rather than a POW. The government claimed that the designation as an enemy (or unlawful) combatant deprived Hamdi of the protection of the Geneva Conventions, and U.S. courts of any claim to jurisdiction, because the guarantees of the U.S. Constitution did not reach to Guantanamo Bay ("Gitmo") because of its status as leased territory.[32] By using Gitmo and characterizing those taken prisoner as "unlawful," the Bush administration had hoped to place them outside of any applicable legal regime.

In sifting through the problems here, we must first distinguish between applicable international law and the procedural complexities of American domestic law. Until the U.S. Supreme Court decisions in *Rasul v. Bush*[33] and *Hamdi v. Rumsfeld*[34] in June 2004, while lawyers debated the international legal ramifications of the Bush administration's position, U.S. courts focused on the scope of their competence to deal with many of the relevant issues. The areas of concern involved (1) the effective territorial reach of the U.S. Constitution—do federal courts have jurisdiction with respect to Guantanamo Bay (particularly the capacity to hear habeas corpus petitions;[35] (2) an interesting (but ongoing) separation of powers issue—whether the president has the *sole* authority (without judicial review) to define the status of detainees taken in various operations against the Taliban and al Qaeda; and (3) questions relating to the status, non-self-executing or self-executing (chapter 4), of the Geneva Conventions. The courts have yet to rule on the substantive questions of how to determine "enemy combatant" status. As a result of the two Supreme Court decisions, the Department of Defense established Combatant Status Review Tribunals (CSRTs).[36]

The Supreme Court decision in *Hamdan v. Rumsfeld* (November 2006) resolved a number of these issues.[37] Salim Ahmed Hamdan had served as a driver and bodyguard for Osama bin Laden and other high-ranking al Qaeda members. Hamdan had challenged the constitutional basis of the military commissions. The court held that President Bush had exceeded his authority in unilaterally establishing the military commissions and that the commissions violated the Geneva Convention and U.S. military law.[38] The Congress almost immediately passed the Military Commissions Act of 2006.[39] Authorities again charged Hamdan with conspiracy to commit war crimes and material support for terrorism in February 2007. In April 2007, the Supreme Court dismissed a lawsuit by Hamdan and another detainee, Omar Khadr, challenging the legality of the trials.[40] In June 2007, a U.S. military judge dismissed all charges on the basis that Hamdan's status was that of an "enemy combatant," not that of an "unlawful enemy combatant," thus the commission lacked jurisdiction to try them.[41]

In September, a newly constituted Court of Military Commission Review, established by the 2006 Military Commissions Act, reinstated the charges against Khadr.[42] The panel held that a military judge presiding over a military commission may determine both the factual issue of an accused's "unlawful enemy combatant" status and the corresponding legal issue of the commission's jurisdiction to hear the case.[43] After an unsuccessful appeal to the Supreme Court, in December, a review panel found that Hamdan did not have POW status.[44] This permitted the trial before a military commission to go forward. The trial, held in late August, resulted in Hamdan's conviction for providing material support for terrorism. He received a sentence of five-and-a-half years with credit for time served.[45]

A second trial before a military commission in late October 2008 found a second defendant, Ali Hamza al-Bahlul, guilty on 35 counts of solicitation to commit murder, conspiracy, and providing material support for terrorism.[46] He received a life sentence. In October 2010, Khadr pled guilty to murder in violation of the laws of war, attempted murder in violation of the laws of war, conspiracy, two counts of providing material support for terrorism, and spying. Under the plea deal, Khadr would serve one more year in Guantanamo Bay and then be returned to Canada.[47] One other event merits mention here. In a July 2008 ruling, *Boumediene v. Bush*, the Supreme Court declared some key parts of the Military Commissions Act unconstitutional.[48] Shortly afterward, another detainee—Mohamed Sulaymon Barre—filed a suit challenging his designation as an enemy combatant.[49] He was released and repatriated to Somalia in December 2009.

In March 2009, the Obama administration announced a new definitional standard for the government's authority to detain terrorist suspects, which does not use the phrase "enemy combatant" to refer to persons who are properly detained. The new standard is similar in scope to the "enemy combatant" standard used by the Bush administration to detain terrorist suspects. The standard would permit the detention of members of the Taliban, al Qaeda, and associated forces, along with persons who provide "substantial support" to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. Courts that have considered the executive's authority to detain under the Authorization for Use of Military Force (AUMF)[50] and law of war have reached differing conclusions as to the scope of this detention authority. In January 2010, a D.C. circuit panel held that support for or membership in an AUMF-targeted organization may constitute a sufficient ground to justify military detention.[51] President Barack Obama had promised the closure of Gitmo from the beginning of his first term. At this writing, prisoners remain at Guantanamo with many issues relating to status unresolved.[52]

PRISONERS OF WAR

In 1899, after leaving the army, Winston Churchill worked as a war correspondent for the *Morning Post*, a conservative daily newspaper. While reporting on the Boer War (1899–1902) in South Africa (Natal), he was taken prisoner by the Boers during a reconnaissance operation.[53] Subsequently he wrote: "Prisoner of War! That is the least unfortunate kind of prisoner to be, but it is nevertheless a melancholy state. You are in the power of your enemy. You owe your life to his humanity, and your daily bread to his compassion. You must obey his orders, go where he tells you, stay where you are bid, await his pleasure, possess your soul in patience."[54] Very few modern POWs would agree with Churchill about captivity as a POW being the "least unfortunate prisoner to be," but a French POW in World War I wrote: "Each prisoner must leave his own will at the gate and understand quickly that he was now at the mercy of one sovereign will . . . that of the keepers."[55] Writing about the POW experience in Vietnam, Stuart Rochester and Fred Kiley emphasized a fundamental truth: "No war has been hospitable to its prisoners."[56] The question of how to treat prisoners of war, like those concerning the status of civilians, form questions as old as the history of warfare.

The previous discussion has emphasized the importance of POW status if captured. Curiously, none of the modern instruments that apply to POWs explicitly deal with the principle purpose of captivity, which, though unstated, *is to prevent enemy soldiers from engaging in further combat.* Those who qualify for POW status must be treated as captives "detained for reasons of security," not as individuals who have committed criminal acts.[57] Hence, the conditions for POWs must materially differ from those of convicts. On the obverse side, no section of any treaty defines "inhumane treatment."

In primitive times, captives were the personal property of the captor, to be killed or used or sold as slaves. Whatever allegiance a prisoner owed to his own leader or king had no meaning. The captive had become nothing more than a piece of movable property. In the Middle Ages, the concept of ransom for nobles and knights, but not for ordinary soldiers, made the capture of wealthy combatants a desirable practice, but holding the lowly foot soldiers as prisoners entailed expenses for their upkeep. Hence, captors did not take and keep prisoners unless it was expedient for them to do so. Soldiers of little status or wealth were killed to reduce the enemy's numbers or forced to join one's own to increase numbers.

With the emergence and evolution of the ideas associated with the sovereign state during the 17th and 18th centuries, more modern thinking on the status of prisoners of war developed as war began to be considered strictly an affair between states. At that time the view became that individual soldiers were enemies only so long as they were armed, and the captors' only right over prisoners was to keep them from returning to the battle lines. This way of thinking began to take hold in the latter part of the 19th century and resulted in the movement to provide more humane treatment for those officially classified as prisoners of war.

POWs: The American Civil War (1861–1865)

During the American Civil War (1861–1865), approximately 409,000 soldiers were taken prisoner. Although precise figures will never be known, an estimated 56,000 men perished in Civil War prisons, a casualty rate far greater than any battle during the war's bloody tenure. Frank Byrne describes conditions in the "Libby" camp at Richmond and the attitudes and reactions of those detained there: To the Confederates, who had established the prison in their capital city of Richmond, Libby was a den of potential pillagers. "Humanity required," according to a committee of the Confederate Congress, "that the most summary measures should be used to deter them from any attempt to escape." To a Union prisoner, Libby was a "filthy prison" controlled by "fiends of perdition" who delighted "to find some pretext, whether real or imaginary, for which to inflict suffering and humiliation upon their unfortunate victims." In contradicting each other's explanations of Libby, the men on either side of its bars revealed opposing facets of a common psychosis. To keepers and inmates, the prison experience often became more an emotional complex than a physical reality.[58]

Unfortunately, this conclusion does not apply across the board to POW experience in the war. Just over 12 percent of the captives in northern prisons died, compared to 15.5 percent for southern prisons.[59] Ignorance of nutritional requirements and proper sanitation, coupled with shortages of food, shelter, and clothing, produced a cauldron of disease and death for inmates. In every war, disease formed a foe sometimes as deadly, if not more so, than the capabilities of the human enemy. The Union's Fort Delaware was dubbed "The Fort Delaware Death Pen," while Elmira Prison in New York saw nearly a 25 percent mortality rate.[60]

Camp Sumter military prison at Andersonville, Georgia, was among the largest of Confederate military prisons during the Civil War. A Union propaganda campaign following the war decried the dire conditions of Confederate prisons while ignoring its own. Even though conditions were not demonstrably worse than in northern camps, because of publicity, Andersonville became the ultimate example of POW abuse.[61] During the 14 months the prison existed, more than 45,000 Union soldiers were confined here in an extremely small area with only a small stream for water, which often ran dry in the summer. Of these, 13,000 died.

At the time in the war when the prison was established, the South was experiencing a widespread shortage of food for both Confederate troops and civilians. Andersonville Prison also had a dire shortage of food, a problem that involved both prisoners and their captors because reversals in the war had wreaked hardship on the general population as Union forces pursued a literal "scorched earth" policy as they moved through the heartland of the South. After the war, the commandant of Andersonville, Captain Henry Wirz, was publicly tried and hanged on charges of murdering soldiers, the only man to be executed for "war crimes." On the basis of the evidence, Captain Wirz paid the price as the scapegoat for the tragedy. *Today, Andersonville National Historic Site has been reconstructed as a memorial to all American prisoners of war throughout the nation's history.*

When the Union began to enroll African Americans into its forces, the South refused to grant POW status either to the troops or the white officers who commanded them. The Confederate government regarded the enrollment of slaves as "a departure from the usages of nations and an abandonment of the rules of civilized warfare."[62] Captured black soldiers were considered captured *property* rather than captured *persons*.[63] One Union general threatened to execute a high-ranking Confederate officer for every captive black soldier enslaved. President Lincoln issued an order in July 1863 that authorized the execution of one Confederate POW for every Union soldier killed in a violation of the laws of war, and that for every Union soldier enslaved, a Confederate soldier would be assigned to work at hard labor on public works (General Order 252).[64] These orders had little impact in practice because of the danger and probability that the South would resort to counter-reprisals.

Hague IV (1907) and World War I

World War I was the first war fought after the adoption of an *international* convention that specified legal standards for treatment of prisoners taken on the battlefield, as well as for the sick, wounded, and shipwrecked. The Lieber Code, though influential, applied only to troops fighting for the Union. The First Geneva Convention (1864) focused on the welfare of sick and wounded military personnel and gaining international recognition and immunity for those working on the battlefield to alleviate suffering. The 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its annex: Regulations Concerning the Laws and Customs of War on Land (July 29, 1899) had a section on POWs (Articles 4–20). These were subsequently incorporated in whole into the 1907 Hague IV (Convention Respecting the Laws and Customs of War on Land). The Hague Conventions marked an important step in terms of international humanitarian law in that they held governments responsible and accountable for the treatment of POWs and defined their status as temporary detainees, not criminals who warranted punishment. Prisoners were to be clothed, fed, and accommodated on the same basis as the troops of the capturing government. States parties agreed to a wide range of other obligations with respect to the treatment of the sick and wounded and communication about, and with, prisoners.

The Hague Conventions represent the culmination of a trend associated with the evolution of the Westphalian state system. Questions of just cause concerning the resort to war no longer occupied political and military leaders, who instead defined their duty solely in terms of *raison d'état*. War had become strictly a question of political calculation, totally separated from any questions about the possible underlying morality of the cause. As international law had evolved during the 18th and 19th centuries, it increasingly regulated relations during peace, the use of force short of war, and conduct in war. It said nothing about the transition from peace to war. War had become a perfectly permissible way to resolve disputes.

Stephen Neff highlights an often-neglected point about the Hague Conventions. The move from just war reasoning marks an important transition in that the rules now presumably applied equally to all parties. War "would be fought with more than a trace of the sporting ethos . . . with low practices such as deception kept to a minimum . . . and a general sense of fair play was much in evidence."[65] Neff stresses that the conventions embody the "rationalistic and technocratic ethos of positivism" that reduced war to "a kind of scientific operation, purged of such primitive and brutish practices as mass slaughter, religious fanaticism, and the like. It was—or meant to be, the final triumph of Athena over Ares."[66]

Treatment of POWs in World War I

World War I yields an excellent case study of the difficulties in complying with the idealism of the convention under the realities of modern wartime conditions. Perhaps inevitably Hague IV looked backward, missing the real impact of modern industrial warfare. No one planned for a long war. As a result, no one had devoted any thought to the problems POWS might present in a long war. No state was prepared to handle the huge volume of POWs, even on a relatively short-term basis, let alone provide for them over what became an extended period of internment. Moreover, many camps, particularly in Germany, contained both civilian detainees as well as POWs.

Hague IV stipulated that POWs should receive accommodation, pay, food, and clothing equivalent to that provided for the troops of the detaining country. At the beginning of the war, Germany and Britain exchanged statements detailing their policies with regard to standards for treatment for those captured. The proposals set extremely high standards. Life in the camps presumably would closely mirror the routine of garrison troops. Officers would even have the service of orderlies to attend to their needs. The exchange did not result in either a formal agreement nor a mutual understanding concerning the minimum required by Hague IV, although both sides remained committed to its objectives.[67]

From the beginning of the war, German authorities found themselves confronted with an unexpectedly large number of prisoners. By the end of September 1914, the Germans had over 125,000 French and 94,000 Russian prisoners. Because everyone expected a short war, no state had undertaken, or even planned for, construction of internment camps prior to the beginning of hostilities in August 1914. The lack of infrastructure to deal with such numbers meant that many prisoners found themselves detained in temporary facilities under very inhospitable circumstances. German authorities commandeered hangars, schools, barns, old forts, and various other types of shelters as temporary housing. Jean-Claude Auriol observes:

> Terrible punishments, insufficient food, grueling work, inhospitable accommodations, these were the miseries the prisoners of 1914–18 experienced in the concentration camps from reprisals or deportation. Yes, deportation, because this type of camp [i.e., concentration] was not created by Hitler, who only continued the work of his predecessor.[68]

Camps were established in the countryside as well as near towns. Those located near populated areas had unanticipated consequences when epidemics of cholera or typhus caused by the combination of overcrowding and totally inadequate sanitary facilities threatened to spread to the civilian population. By 1915, the prisoner total had increased to over 650,000. At war's end in 1918, John Yarnell estimates the total number of POWs held by all belligerents exceeded 6.5 million, with Germany, Austria-Hungary, and Russia holding 5.65 million of the total. In contrast, France had 350,000 and Britain had 328,000 with the remainder distributed among the other belligerents.[69] Totals vary because many camps held civilian internees as well. At the end of the war, in October 1918, the POW population held by Germany alone had grown to more than *2.4 million*, or the approximate equivalent of the 1918 population of the state of Kentucky (ranked 15th in population among U.S. states in 1918).[70] Berlin, the largest city in Germany, had only 1.9 million inhabitants.

As a management problem, consider the number of guards and other personnel needed to set up and maintain camps for this number, taking away from the battlefield effort, as well as the drain on food and other needed materials for both troops and one's own civilian population. Ninety percent of the deaths in German prison camps resulted from malnutrition and disease. John Yarnall makes an important point in discussions of the POW experience. Survival of the journey from the point of capture to the point of detention often proved as daunting, if not more so, than the conditions of internment.[71] Makeshift temporary quarters, long marches, overcrowded trains/trucks, and insufficient rations during the journey subjected detainees to conditions where prisoners often arrived at the camps with their health already severely weakened by the ordeal during transport.

The Germans did not segregate the camps by nationality. Nothing in The Hague convention required that "birds of a feather" should be housed together. Americans, Belgians, Brazilians, British, Canadians, the French, Greeks, Italians, Japanese, Montenegrins, Portuguese, Romanians, Russians, and Serbians shared accommodations. One might think that the bonds of captivity might somewhat mute potential antagonisms among prisoners, but Richard Speed records that "the differences in customs and habits of life . . . particularly in reference to food and ventilation, produced dissatisfaction and accentuated discontent."[72] The conclusions of Gavin Daws, in his study of POWs interned by Japan in World War II, apply here as well:

> Between prisoners, there was also nastiness and hostility about nationality . . . [A] l the way down to starvation rations, . . . to the extremities of degradation—all the way to death—the prisoners of the Japanese remained inextinguishably American, Australian, British, Dutch. . . . These national-cultural differences were obvious

> everywhere in the camps, in matters crucial to survival, from discipline to food gathering to medical-surgical doctrine on amputation. What emerges is that much of the life-or-death behavior of POWs was based on national origin, the sum of what men carried with them from the place of their birth and upbringing into prison camp . . . [I]t was nationality above all that determined, for good or ill, the way POWs lived and died, often *whether* they lived or died . . . [T]he big ethnic-cultural-national tribes simply were what they were, for good and ill—for good and evil.[73]

Yarnall concludes: "It seems likely that cultural differences and different attitudes to discipline were . . . at the root of many of the complaints by the British of Ill-treatment."[74] The German policy proved more a problem for maintaining internal discipline rather than a war crime.

Reprisals

As a concept that does not constitute part of any modern domestic legal code, reprisals comprise illegal acts taken in response to prior illegal acts by the enemy to compel compliance with, or gain redress for, a material breach of an obligation. In essence, a wrong permits a wrong to enforce a right. In a system without central institutions for enforcement, this becomes the equivalent of the blood feud in the sense that the responsibility for enforcement lies with the state suffering the consequences of a violation. As legal principle, the nature and extent of any reprisal are ostensibly governed by the principle of proportionality.[75]

Surprisingly, Hague IV did not prohibit reprisals against POWs. At the beginning of the war, the British were reluctant to engage in reprisals because they feared the German retaliation in response would be far more ruthless. Nonetheless, lacking other means of forcing compliance with alleged breaches of the law, both sides eventually resorted to reprisals as a means of redressing grievances and injustices.[76] Annette Becker sardonically notes:

> Reprisals are collective punishment against prisoners to put pressure on the opposing [belligerent] parties. All states utilized them at one time or another, alleging different reasons: poor treatment of prisoners, . . . and/or inadequate food, (or) utilization of prisoners in areas of active combat. . . . Since sometimes civilians and the military found themselves in the same camps, they "Enjoyed [benefitted from]" the same system of reprisals.[77]

The 1929 Geneva Convention[78]

World War I revealed many deficiencies. Many came from a lack of precise specifications in Hague IV (1907). Some issues were resolved through special agreements made between belligerents in Berne in 1917 and 1918. In 1921, the International Red Cross Conference (ICRC) held at Geneva expressed a desire that a new convention on the treatment of prisoners of war be developed. The ICRC drew up a draft convention that was adopted at a diplomatic conference convened at Geneva in 1929. The convention did not replace the provisions of The Hague regulations but amended and extended them. The most important innovations consisted of the prohibition of reprisals and collective penalties, the organization of work by prisoners, and the extent of control exercised by protecting powers.[79]

World War II

Dealing with the treatment of POWs in World War II requires understanding that Germany had defined several different enemies, which resulted in different policies. German treatment of POWs depended on the "enemy" (Jews and others races defined as inferior or "subhuman") and the theater of operations—Western Europe, the Pacific, or Germany's eastern front. This reflects a simple but incontrovertible fact—the fate of one's own, whether tribal member or fellow national, counts more than a foreigner with whom one lacks any connection that may forge a bond based on identity. In Western Europe, while occasional acts of deliberate murder occurred on both sides (see chapter 7), in the ground war both sides generally observed the regulations set forth in the 1929 Geneva Convention. The Germans, according to their own ideology, acted with greater restraint toward others whose kinship they acknowledged. Eastern Europe and the Pacific exemplified war without quarter.

Until 1944, most of the British and American prisoners held in Germany were airmen. The same did not hold true for the French. While no precise estimates exist, the number of French soldiers captured during the invasion of France between May and June 1940 is generally placed at 1.8 million—equivalent to around 10 percent of the total adult male population of France at the time.[80] After a brief period of captivity in France, many of the prisoners were transported to Germany. In Germany, prisoners were incarcerated in *Stalag* or *Oflag*[81] prison camps, according to rank. The vast majority were soon transferred to work details assigned to German agriculture or industry. Because of Nazi racial ideology, colonial prisoners endured extreme privation in camps with poor living conditions and harsh work assignments.[82]

While atrocities occurred on the western front, these did not form a pattern. With some exceptions, the forced march of American/Allied prisoners into Germany in bitter cold weather during and after the Battle of the Bulge (December 1944), for example, the Germans attempted to honor the standards of the Geneva Convention. On the other side, between 1942 and 1946, 400,000 German, 50,000 Italian, and 5,000 Japanese POWs were housed in camps within the continental United States. U.S. policy reflected the pragmatic view that if it treated enemy POWs humanely, the other side would reciprocate to the extent that its means permitted. Conditions in the U.S. camps in terms of housing, nutrition, and amenities reflected a commitment to honor the regulations in the 1929 Geneva Convention.[83] Arnold Krammer concludes that the principal problems of the American POW program came from the inability to distinguish "real" Nazis from political opportunists:

> German speaking guards were nearly nonexistent . . . Despite the several attempts by the War Department to segregate the hardened Nazis from the less fanatic captives, nearly all of the 155 base camps and 511 branch camps experienced some internal ideological struggle. In some cases, entire camps fell under the control of a minority of obdurate Nazis as the result of terror campaigns [physical intimidation].[84]

The language problem, and that of organized gangs of internees controlling camp life, would also plague the camps under United Nations auspices in Korea.

Conditions on the eastern front and in the Pacific differed significantly. The Germans dealt with Soviet prisoners of war in accordance with the presumptive "subhuman" nature Nazi ideology accorded to Slavic ethnicity. Under the legally insupportable pretext that the Soviet Union had not signed the Geneva Convention (1929), the Germans dealt with Soviet prisoners with horrendous brutality. The military leadership of the *Wehrmacht* (German army) did not resist the idea of the war as a racial conflict that entailed the virtual annihilation of the enemy or at least its leadership cadre as a legitimate objective.[85] Many captured Soviets were executed on the spot, died as slave laborers, or ended up in death camps. Of the 5.7 million Soviet prisoners taken by the Axis powers, 3.3 million died from disease, starvation, and ill-treatment.[86] This figure, when compared to the 8,348 Western Allied prisoners who died in German POW camps (of a total of 232,000) starkly illustrates the radically different treatment given to those soldiers captured on the western front.

On the other side, prisoners taken by the Soviet Union also faced a grim fate. In September 1939, when the Soviets began to arrest, deport, and execute Polish intellectuals in their occupied zone of Poland, their policy did not differ in any substantive way from that of the Germans in Poland to the west. Following the Soviet invasion of Poland in September 1939, thousands of Polish soldiers were captured and executed. More than 20,000 Poles were killed in the Katyn Forest massacre.[87] Of the almost 100,000 Germans captured following the Battle of Stalingrad, only 5,000 survived the war. Many German captives were sent to labor camps in the depths of Russia, where hunger, exhaustion, and freezing conditions killed thousands. When the Soviets turned the tide on the eastern front, they routinely refused to take prisoners. One Soviet sergeant justified the policy: "The rule of war is that you go into battle, you see the enemy, and that enemy is not a human being. Putting your hands up isn't going to save you."[88]

The war in the Pacific was equally brutal. From the first landing on Guadalcanal, prying the Japanese out of their positions required an overwhelming application of American firepower. As the American island-hopping advance approached the Japanese Home Islands, the Japanese fought with increasing ferocity, demanding even more resources in terms of men, equipment, and supplies. John Dower concludes: "By the final years of the war against Japan, a truly vicious circle had developed in which the Japanese reluctance to surrender had meshed horrifically with Allied disinterest, on the battlefield and in decision-making circles, in taking prisoners or contemplating anything short of Japan's throughgoing defeat."[89] At Tarawa, only 17 of a Japanese force of 4,836 surrendered. In New Guinea, 95 percent of the 200,000 Japanese troops sent there died.

For their part, the Japanese had only contempt for anyone who surrendered because honorable warriors fought to the death for their emperor or cause. Those who did not do so had no worth and deserved no compassion or humane treatment. Accordingly, they had no responsibility to ensure the safety and health of those captured. Among many atrocities, the Bataan Death March after the fall of Manila in 1942 stands out as one of the most infamous episodes in a war that bred brutality. In the aftermath of their surrender, more than 76,000 American and Filipino soldiers were made to walk 66 miles, in scorching temperatures, to a railhead for transportation to a prison camp.[90] The Japanese provided no food or water. Prisoners had to rely on whatever sources they could find along the way. Some were beaten, bayoneted, and beheaded by "cleanup crews" who killed stragglers and those too ill and weak to continue.[91] Trucks drove over some of those who fell or succumbed to fatigue; others died of heat or exhaustion. A Japanese soldier recounts one incident along the march:

> These *horyo* [prisoners] had disgraced themselves. In the middle of a battle they had laid down their arms and raised their hands, a shameless act for any soldier. Should such men be received with respect? . . . He wanted revenge . . . They had been trained to "destroy" the enemy, to exterminate him . . . Rights? *Horyo* didn't have rights. Their lives belonged to the Imperial Army now, and the Imperial Army wanted its due . . . The prisoners were going to be killed, this was something that had to be done.[92]

At the railhead, 100 or more prisoners were stuffed into each of the trains' unventilated boxcars for transport to Camp O'Donnell. The trains had no sanitation facilities.

At the camp, overcrowded conditions, malnourishment, and poor hygienic conditions caused dysentery and other diseases to spread, taking a heavy toll on the prisoners because of very limited access to medical treatment.[93] In June 1942, the Filipino POWs were granted amnesty by the Japanese military and released. The Japanese then moved the American prisoners from Camp O'Donnell to Cabanatuan. Many of the survivors were later sent to prison camps in Japan, Korea, and Manchuria in prisoner transports known as "hell ships." The 500 POWs who still resided at the Cabanatuan Prison Camp were freed in January 1945.

Repatriation

At the end World War II, the question of repatriation became a hot-button issue because many Soviet POWs did not wish to return to their homeland. This posed a dilemma for the United States and Britain because of the perceived necessity of maintaining a working relationship with the Soviet Union in order to create and manage postwar arrangements for the occupation of Germany. At the Yalta Conference, Churchill and Roosevelt agreed that Western Allies would return all Soviet citizens who found themselves in their zones to the Soviet Union.

This immediately impacted the liberated Soviet prisoners of war but was also extended to all Soviet refugees. In exchange, the Soviet government agreed to hand over several thousand western Allied prisoners of war whom they had liberated from German prisoner-of-war camps. Russian POWs hated what they had observed and endured. More importantly, all of them feared what would happen to them on return because they had surrendered. Mark Elliott writes:

> In a small cemetery on the bank of the Drava River near Leinz, Austria, lies the mute evidence of a wartime tragedy. The 134 persons buried there all died on June 1 or 2, 1945, all were Soviet nationals, and all committed suicide. These dead, and a few comrades who still tend their graves, were the only ones to escape forcible repatriation from Leinz. British troops handed over 30,000 others to Soviet authorities.[94]

A similar incident occurred at Fort Dix, New Jersey, where Soviet citizens captured in German uniform were interned. On the date set for their embarkation (June 1945) for Russia, fearing what Stalin might do to them for having been taken captive by the Germans, the groups attempted a mass suicide.[95] Perhaps the most graphic description of resistance came from an incident at Dachau where, "collapsing in the snow from wounds of their own making, the Russians, preferring death to repatriation, begged to be shot by their American guards."[96]

Over a million Russians were returned against their will, and most of them were either immediately killed or sent to the gulag, where many later died. The repatriation of German prisoners from America also faced some problems, but these mainly flowed from the discontent with the American policy of transporting the rabid Nazis first.[97] The politics of repatriation would become an issue that would also delay a settlement of the Korean War because POWS became pawns in the "high politics" of the evolving Cold War.

GENEVA CONVENTION III (1949)

Geneva Convention III replaced the Prisoners of War Convention of 1929. Revision became necessary because of the changes that had occurred in the conduct of war. As with the 1929 convention, the goal of the revision was to give more explicit guidance concerning the general regulations that applied to the daily life of prisoners. In addition, because the text of the convention was supposed to be posted in all prisoner-of-war camps (Article 41), it had to be comprehensible not only to the authorities but also to the ordinary reader at any time. The categories of persons entitled to prisoner-of-war status were broadened in accordance with Geneva Conventions I and II. The convention more precisely defines the conditions and places of captivity, particularly with regard to the type of labor prisoners of war can be required to do, their financial resources, the relief they are to receive, and the judicial proceedings instituted against them.[98] To summarize quickly, under the convention, prisoners are subject to the discipline and jurisdiction of the detaining power, but punitive measures are carefully regulated. Prisoners must respect and obey orders designed to enforce good order and discipline but cannot be compelled to divulge any information other than name, rank, serial number (service number), and date of birth.

On the duties side, the detaining power *must* at all times treat POWs humanely and refrain from any actions that might constitute discrimination on the basis of race, nationality, religious belief, political opinion, or similar criteria.[99] Prisoners may be placed into guarded camps (GC III, Article 21.1), but these must be away from danger zones and not close to any area or structure that might be considered a military objective (GC III, Article 19.1, Article 23.1). POWs may not be used as shields. Weapons may be used to prevent escape (GC III, Article 43).

Any play or film involving World War II inevitably has an interrogation scene where the American or British POW simply continues to recite his name, rank, and serial number (actually, service number). According to the 1929 Geneva Convention, incorporated into GC III (1949), POWs cannot be required to give more. Article 17 of GC III also limits interrogation methods: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." The detaining power may use the labor of able-bodied enlisted men for certain nonmilitary projects (Article 49.1). Noncommissioned officers can only be assigned supervisory work, and officers are exempted from compulsory work (Articles 50.1, 49.2, 3). Any POW who works should be paid on the basis of the equivalent pay grade for the detaining military. Prisoners may not be employed against their will on projects considered unhealthy or dangerous (Article 52). POWs may only be tried and prosecuted for acts considered unlawful if committed by the forces of the detaining power (Article 87.1). GC III forbids collective punishment (Article 87.3).

Prisoners must be fed and provided with drinking water. The convention requires that the normal diet of the POWs should be taken into consideration (Article 26). Thus, it would be improper to force Muslim POWs to eat food forbidden by their religion. The POWs should be properly clothed. In most cases this means the POWs will wear a uniform of some type, either their own or one issued by the captor (Article 27). Enlisted personnel may be put to work not directly assisting the war effort of the captor state and are to be paid for such work. Officers cannot lawfully be forced to perform such work but may do so on a purely voluntary basis (Articles 50–68). All prisoners are to be paid at the rate applicable to their rank at the time of capture, the actual terms of payment being outlined in the convention (Article 69).

Observance of GC III does not depend on reciprocity. Article 16 forbids reprisals against POWs for any reason. The obligations permit no derogation on the basis that an enemy force has not embraced the convention or violated some provisions. POWS may, however, face trial for war crimes committed prior to detention or for ordinary crimes (robbery, theft, homicide, etc.) committed after detention.

Korea

The Korean War began on June 25, 1950. It formally ended with the signing of the Korean Armistice Agreement on July 27, 1953. Technically, a final peace settlement in the form of a treaty has never occurred. The armistice agreement essentially called for a cease-fire, restored the status quo ante, placing the border between North and South at the 38th parallel, and authorized the repatriation of POWs. The armistice also established the Korean Demilitarized Zone as a means of ensuring border security.[100] In reality, a stalemate with little active fighting had existed since mid-summer 1951, when it became obvious that winning outright was not an option because it would entail a commitment of men and materiel that was not politically possible due to the low level of public support for the war.

Ninety percent of American POWs were taken in the first year. The majority of deaths occurred during that period because the North Koreans had made no prior arrangements for permanent camps. The captives had little food and faced long marches through snow and ice in temperatures that reached *minus* 30 degrees Fahrenheit to very rudimentary facilities. These marches did not represent anything new. The necessity of removing large numbers of prisoners quickly from the front lines under difficult conditions has often resulted in long forced marches. Perhaps the most notorious of many in the Korean War was the Tiger Death March (October 21–November 8, 1950), named after the North Korean colonel in charge of the march. It lasted only nine days, but it had long-term effects. Within a year, fewer than 300 of the original 845 prisoners were still alive (68 percent mortality).[101]

Because of a total lack of medical care, disease took its toll on immune systems compromised by malnutrition. Lice, intestinal parasites, dysentery, scurvy, pellagra, cholera, pneumonia, and tuberculosis were among the pestilence and ailments endured by the captives. In the camp known as "the Caves" (Camp 9), prisoners had to sleep in several inches of mud because the roof leaked. When Airman First Class Marvin King came to the Caves in May 1951, there were 76 other prisoners. Six weeks later, the North Koreans transferred King and 11 others to Camp 12. The other 65 had died.[102] When the Chinese took over the camps, conditions improved, although in the early stages of their control the Chinese transit camps were almost as deadly as those of the North Koreans. The camp at Pyoktong had a mortality rate of 50–70 percent. However, by the end of the summer of 1951, improved food and housing had reduced the death rate to almost zero.[103]

Several factors shed light on the perception that the percentage of prisoners who committed some act serious enough to merit investigation and trial was so high in the Korean War in comparison with the two world wars. First, the Korean War, unpopular at home, also rates as one of the darkest moments in American military history because the POWs became pawns in the political nightmare induced by American fears in the early years of the Cold War. This produced a double drama. On the one hand, their captivity was extended for 17 months over the issue of repatriation of Chinese and North Korean soldiers. On the other hand, their behavior in the camps produced charges of collaboration with the enemy that resulted in a modern witch hunt on their return due to the impact of McCarthyism and the "Red Scare."[104]

In an article written shortly after the war ended, Major George Prugh argued that "it is now apparent that there is a definite trend backward to the extension of the battlefield into the prisoner of war compound, to making the captive a prisoner at war rather than of war."[105] Although the use of the indoctrination techniques that became known as "brainwashing" was not new or novel, their extensive and intensive employment by the Chinese created many unique problems in Korea. The probe gave little consideration to either the immense hardships suffered, particularly in the early phases of the conflict, or to the pressures often brought to bear on captives. Although the behaviors probably were marginally worse than that which occurred in some of the Japanese camps during World War II, media coverage of political broadcasts that featured Americans often uttering very off-key "propaganda" statements were seen as proof of conversion to Communism. The military itself was divided on whether to blame enemy mistreatment or individual weakness.[106] The GIs returning from World War II were treated as heroes; those returning from Korea were treated like pariahs and apostates.

Second, the vague nature of U.S. policies and goals in Korea created confusion among those fighting that in turn led to feelings of abandonment. One should not underestimate the depth of disillusionment from frustrations over the pace of negotiations.[107] The Chinese employed all possible means to achieve their goal of "re-education": a program of indoctrination, threats, simple psychological pressure, manipulation of welfare conditions (food and other "perks"), segregation, corruption, the playing of prisoner against prisoner, and force and outright torture.[108] They exploited the captives' fear of the unknown, producing a state of emotional confusion in prisoners who were encouraged to feel grateful toward their captors for sparing them from death and torture.

Charles Young observes that "one of the first things to know about Korean captivity is that 38 percent of 7,190 American POWs died."[109] The rate of death in the first months reminded the survivors that they were at the mercy of their captors. Without officers to enforce discipline, adversity brought out the worst in many. Some of the squad huts descended into a Hobbesian hell of brutal anarchy where the stronger preyed on the weaker. "Rats," or those who willingly cooperated, were a problem from the beginning. They seized any opportunity to gain more favorable treatment, whether it involved stealing food or informing on others. Starvation broke the spirit of POWs in the first months of captivity in 1950–1951. It was a population where the worst of human behavior had already been established. Fighting, stealing, and mistrust encouraged an "every man for himself" behavior.[110] A 1955 *Science Digest* article suggested: "Ex prisoners of Korea who collaborated with the Communists or who are under suspicion of collaboration fall into definite personality patterns: big dealers, play-it-coolers, introspectives, dupes, scared kids, praise starved egotists."[111]

The Korean camps included two other sites around Pyongyang in addition to the Caves: "Pak's Palace," the interrogation center, and Camp 12, which became known as "Traitors Row." One former internee wrote of Pak's Palace, "I don't know of anyone who stayed there for more than six months and survived."[112] In Camp 12, the Koreans sought to emulate the Chinese program of reeducation. Labeled a "peace camp," its sole purpose was to generate propaganda condemning the war. The two senior leaders of the camp, Lt. Colonel Paul Liles and Lt. Colonel Harry Fleming, cooperated in producing Communist propaganda but in return were able to cut the death rate of men in their camp through better treatment. Both men were court-martialed as collaborators after the war. Fleming was given a dishonorable discharge. Their cases clearly raise the issue of what defines "collaboration" as opposed to cooperation for survival.

When cease-fire negotiations began, conditions in the permanent camps run by the Chinese started to improve, although those in the temporary camps and interrogation centers run by the Koreans remained appalling. These camps contained POWs taken in April and May (1951) during the last Chinese offensive. William Latham highlights the difference in attitude: "The Chinese had belatedly recognized the propaganda value of keeping UN prisoners alive, but their North Korean allies continued to treat the men like cattle . . . To make matters worse, the communists temporarily halted the northern movement of captives that summer on the assumption that a prisoner exchange was imminent."[113]

The Chinese and Koreans also used intense psychological pressure and physical torture to extort "confessions" for propaganda purposes. Physical torture was used primarily to gain military information but also to bring "reactionaries," defined as those who resisted indoctrination efforts, into compliance and to punish infractions of the camp rules and regulations. For cases in which neither supposed incentives nor deterrents succeeded in eliciting cooperation, the Chinese established penal camps for the most obstinate of the "reactionaries" so that they could not hinder the "reeducation" of others. The penal camps had much stricter discipline than in the other compounds, almost nonexistent sanitary facilities, and rations reduced to the minimum necessary for survival. Some of the more obstinate "reactionaries" remained in solitary confinement during their entire stay in the camps.[114]

The Chinese reeducation project proved an abject failure. Brutal treatment had done little to impress the captives with the virtues of Communism or the vices of a prosperous post–World War II America. The problem with Chinese propaganda sprang from the simple fact that the very skewed and negative images it portrayed of American society couched in the stilted language of Marxism had little resonance with the prisoners. The segregation of African American soldiers undermined efforts as well because it was seen as replicating racial discrimination in the United States.[115] In the heat of the Red Scare, the simple fact was that, out of over 7,000 American POWs in captivity, only 23 chose to stay in China, and 3 of those 23 later changed their minds. Nonetheless, there was outrage and shock over the idea that *any* American soldier would choose the constraints imposed by the chains of Communism over the benefits of life in a free society.

After the war, the U.S. military came to realize that soldiers needed realistic instructions on their duties if captured. Before the Korean War, training consisted solely of instructions to reveal only name, rank, and serial number. Post-Korean-War training would include realistic advice on how to retain self-respect and the will to live even if tortured into giving more than "name, rank, and serial number." The training stressed the need for collective cohesion and mutual support as essential to survival. As a means of making it less likely that the enemy could safely murder POWs, the training also emphasized that collecting the names and identities of as many fellow POWs as possible formed an important duty. Vietnam War POWs, even when kept in solitary confinement, would show ingenuity in acquiring and transmitting this information, although the enemy tried to silence them by isolation and other punishments.[116] Interestingly, although the North Vietnamese did engage in psychological torture, they did not mount a systematic program aimed at "reeducating" American POWs.

American/United Nations Command POW Camps

The American/United Nations Command side had its own problems with camps and the South Koreans. After the successful operation at Inchon broke the North Korean advance, by the end of October 1950, the UN Command had custody of 176,822 POWs concentrated in three areas: the captured North Korean capital of Pyongyang and the southern ports of Inchon and Pusan. When the U.S. and South Korean armies advanced across the 38th parallel in October, they left two U.S. divisions, three South Korean divisions, and the Korean National Police in South Korea to deal with any North Korean army stragglers and thousands of South Korean Communist Party partisans. All Communist Party members and suspected sympathizers in South Korea became fair game. American and British soldiers, as well as Western journalists, witnessed mass summary executions around Seoul. Allan Millett asserts: "For any Korean who thought he could be suspected of collaborating, surrendering to the Americans looked attractive."[117]

The defeat of the North Korean army unexpectedly created a complex problem in sorting out and categorizing the detainees. Initially, North Korean soldiers appeared easy to identify. They surrendered in uniform on the battlefield. Yet interrogators soon realized that many of them were South Koreans who had been forced to join. Consequently, any South Korean civilian who could convince an interrogator that he had been forced into service as a North Korean soldier or supply bearer was released. However, the UN Command turned over South Korean soldiers forced into the North Korean army to the South Korean army's military police and intelligence officers for further screening. Fearing that their South Korean jailors would execute or torture them, they initially proved docile and cooperative.[118] Many of the North Koreans had also been forcibly recruited and did not wish to return home. The question of voluntary repatriation would become the hot-button issue that would delay agreement for 18 months. The Chinese intervention necessitated the evacuation of all prisoners held in the North. Most were sent to Koje-do Island. Eventually the Koje-do camp would house 170,000 Chinese and Korean internees.[119]

Conditions in the UN camps did not meet the standards set in the Geneva Conventions, even though the U.S. Army had taken control of the camps in September of 1950. The transfer of prisoners to Koje-do provided better security but also resulted in severe overcrowding, which in turn led to a high incidence of health problems. From the beginning, all of the camps had too many prisoners and too few guards. Unfortunately, because of a severe manpower shortage, those assigned as guards generally came from the goldbricks, slackards, and malcontents of other units who received little training for the job. A combination of insufficient manpower, apathy, and incompetence produced a situation where the jailors had no control over discipline and governance within the camps. Over time, inmate gangs became the effective regulators of life within the compounds because the undermanned guard force refused to enter the compounds. Violence was part of everyday life. Internal struggles for control of essential resources such as food and clothing produced competition between rival gangs for supremacy. The internal competition included an increasingly violent ideological struggle between Chinese/North Korean factions and South Korean supporters. By February of 1952, over 6,000 prisoners had died while in UN custody.[120] In particular, Communist prisoners of war, rather than being regarded as passive human beings in need of care and protection until they could be returned home, had to be treated as active soldiers determined to fight on in whatever way their leaders dictated.[121]

UN Command initiatives in 1950 and 1951 contributed to the resistance movement among the Communist POWs. First, an effort to reduce an epidemic of gastrointestinal diseases generated resistance from Communist factions who claimed it was a cover for the "germ warfare" campaign waged by the United States.[122] By the autumn of 1951, the public health teams found it harder and harder to reach the POWs; some even attacked them in the compounds. Providing effective medical treatment had become a political struggle for the hearts and minds of the POWs. Second, the Chinese were not the only side to engage in "reeducation." The UN Command authorized their own political-religious education programs aimed at Korean and Chinese POWs. Millett notes:

> Communist Chinese and North Korean political leaders fully appreciated that Christianity represented a more serious ideological challenge than the vague promises of Western democracy and capitalism. In broadcasts and publications of

> the Chinese People's Committee on World Peace, in speeches at the Panmunjom negotiations, and through sympathetic journalists Winnington and Burchett, they repeatedly attacked the indoctrination program staff as religious fanatics, dupes, fellow travelers with the Chinese Guomintang fascists on Formosa, and capitalist agents.[123]

Finally, the decision to conduct an investigation into war crimes committed by the North Koreans and Chinese added additional fodder for their agents inside the camps. None of these programs alone was responsible for the resistance movement, but all provided extra opportunities for the Communists to reduce UN Command access to the POWs as Communist agents attempted to turn the POWs into weapons of warfare.[124]

The violence reached a peak in early 1952. In February, Compound 62 refused access to a UN team of interrogators (screeners). Regular U.S. Army troops forced entry, resulting in 77 dead. A March incident resulted in 12 dead after guards opened fire in response to a rock-throwing incident. In May, prisoners managed to seize the camp commander, Brigadier General Francis Dodd. The general was then placed on "trial" for prisoner abuse and released only after he signed a statement acknowledging the validity of the prisoners' concerns. Another 31 deaths ensued from a confrontation in June, again requiring the intervention of regular troops.[125]

Repatriation

Many commentators have argued that if the discussion had been strictly limited to military questions, a relatively quick truce agreement would have been possible. Originally the United States had intended to bar political questions and to restrict the delegations to the military considerations inherent in a cease-fire. Both sides had initially assumed that all POWs would be exchanged at the conclusion of an armistice. However, among the prisoners held by the UNC were many former residents of South Korea who had been inducted into the KPA and subsequently captured. The United States agreed with the South Korean government that they should be allowed to return to their homes in the south. Moreover, many of the Chinese soldiers in the CPV had originally been in the Nationalist Chinese army, and some of these were likely to prefer to go to Taiwan rather than being forced to return to Communist China. Influential U.S. politicians foresaw a moral and propaganda victory if large numbers of Chinese and North Korean soldiers rejected Communism by refusing repatriation.[126] By the time negotiations began on the POW issue, President Harry Truman had become convinced that prisoners should not be repatriated against their will. The two sides had reached an agreement on an armistice line in the summer of 1952, but the repatriation issue stalled further agreement.

The UNC was willing to return all prisoners who were not violently opposed to repatriation. The Communists demanded that all prisoners, willing or unwilling, be returned. In November, frustrated by the lack of progress on the issue, the UNC unilaterally called a recess. In response, the Chinese army initiated savage attacks in the Chorwon area. The U.S. Eighth Army counter-attacked in the Triangle Hill complex. Both assaults were large in scale, very bloody, and generally unsuccessful. In addition, the UNC approved air attacks against the North Korean infrastructure, particularly the hydroelectric dams on the Yalu River. While the air attacks devastated the North Koreans economically, they seemingly had little impact on the Chinese leadership, although the war effort had had a severe economic effect on Chinese development plans. In sum, although the level of violence increased in the latter part of 1952, it had little impact on the negotiations.[127] Neither of the efforts produced a break in the stalemate in the sense of altering positions.

The election of Dwight Eisenhower in November 1952 and the death of Joseph Stalin in March 1953 changed the picture. Eisenhower had campaigned on a platform that advocated a quick end to the conflict. Stalin's successors, fearful of unrest in Eastern Europe, had also called for an expeditious resolution. In November 1952, India proposed an initiative endorsed by the UN General Assembly, but initially rejected by the Chinese, that eventually provided a breakthrough. The Indian plan would set up a neutral repatriation commission to monitor the release of POWs who had indicated a reluctance to return home. Under the plan, a Neutral Nations Repatriation Commission (NNRC) would be established in the demilitarized zone to take custody of all prisoners who had indicated a desire not to return home. Indian soldiers would provide guards, while representatives of their home countries had the opportunity to try to persuade them to accept repatriation.[128]

The United States made the first move to break the impasse. In late February 1953, General Mark Clark, acting on a proposal from the Red Cross, called for an exchange of sick and wounded prisoners. The Chinese and Koreans accepted the proposal in late March. Prisoner exchanges began on April 20, 1953 (Operation Little Switch). The truce talks resumed on April 26. At the first meeting, the Chinese/North Korean delegation proposed adoption of the NNRC. At this point, the UNC proposed some additional requirements that further stalled the negotiations. Rather than push the new demands, the UNC decided to drop them. On May 25, it presented what it called its final proposal. In the interim, the United States had stepped up its air attacks on North Korea and had threatened a new offensive that might include attacks on China and the use of nuclear weapons.[129] The Chinese and North Koreans accepted the proposal, and the two sides signed an agreement on June 8.

The final agreement stipulated that all POWs would be handed over to the NNRC. The parties would have a 120-day period during which they would have access to those who resisted repatriation to persuade them to return home. After that, the remaining POWs would either be given civilian status or their futures would be decided by the UN General Assembly. The commission would decide all disputes by a simple majority vote. In an attempt to overturn the agreement, President Syngman Rhee, who adamantly opposed any compromises on the question of no forcible repatriation of prisoners, released 27,000 North Korean prisoners who had refused to return home.[130] In response, the Chinese and Koreans indicated that unless the UNC could assure South Korean compliance, no armistice was possible.[131] Through U.S. pressure and promises of future support, Rhee reluctantly signed off on the agreement. The final document was signed on July 27, 1953, at Panmunjom.

Court-Martial Proceedings

The pre-Korean War history of POWs who committed crimes against their fellow prisoners, collaborated, or defected is sparse and somewhat inconclusive. Although some controlling precedents emerged over time, most misconduct cases were decided on the particular facts involved. A further complication in previous American prosecutions stemmed from the fact that until 1951 military law did not have any provisions specifically covering the behavior of prisoners.[132] Hence, until then, disloyal-prisoner cases were, of necessity, tried under the civilian law of treason. Although the early prisoner cases, and other treason cases by analogy, give some indication of what acts are punishable and what circumstances will excuse the offenses or go to their mitigation, the somewhat novel problems involved in the Korean War generated many new questions apart from the overarching emphasis on Cold War concerns.[133]

Acts considered prosecutable include joining the enemy military, giving military information, acts detrimental to other prisoners, and generally collaborating with the enemy. Inhumane treatment received by all of the prisoners has generally not been held as a sufficient defense to a charge of treasonable conduct. The common law defense was adopted in the first American prisoner-of-war case, *Respublica v. McCarty (Republica v. M'Carty)*.[134] The law remained unaltered until the problems raised by prison conditions and the mass defections in the Civil War necessitated a change. An analysis of early English and American cases indicates that courts consistently drew a line between "fear of immediate death" and all other degrees of duress and gave little consideration to the relative seriousness of the acts of disloyalty. For misconduct, all received the same relative weight under the catch-all appellation of treason.[135]

During the Civil War, despite the great amount of authority supporting the "fear of immediate death" rule, the judge advocate general advised that, considering the "authenticated cruelties" practiced on Union prisoners and the generally fatal results of such treatment, if a prisoner enlisted in the enemy ranks solely as a means to escape from the privation and suffering of the stockade, "he should not be treated as a deserter on recapture or repatriation."[136] Acceptance of this defense was the first deviation from the strict *McCarty* rule. Although the gravity of the misconduct involved was comparable to that in the older cases, the degree of coercion necessary to excuse was less. To ensure that the new rule would not lead to wholesale surrender by soldiers eager to obtain either parole or nonactive duty with the enemy, the War Department issued a general order to the effect that all captured federal troops had a *duty* to escape and return.[137]

Coercion was not raised again as a defense to prisoner misconduct in an American trial until after the Korean War, even though it did form a central issue in the two leading English cases that emerged from World War II. The decisions of these cases show a significant change in approach. Two of the English cases generated great interest. In the first, a seaman in the Royal Navy, Henry Rose, was convicted for giving military intelligence concerning the specifications of naval power plants to the enemy. The court found him not guilty on several other counts of furnishing military intelligence. In the second case, an army major, Cecil Boon, was charged with 11 counts of collaboration with his Japanese captors. Boon served as the stockade liaison officer between the camp command and the internees. Charges included spying on his fellow prisoners; constantly searching their living quarters and personal effects; informing on escape plans, hidden weapons, and escape equipment; and cooperating in making a Japanese propaganda film.[138] The court ruled the prosecution had not established a *prima facie* case for any of the charges. Interestingly, based on testimony, Rose had been subjected to a much greater amount of abuse and intimidation than Boon, but the courts seemingly focused on the *gravity of the misconduct* rather than the *degree of coercion*.[139] Both factors were given great weight in the trials as well as in the pretrial investigations of Korean War prisoners suspected of misconduct. Voluntarily becoming an informant, which ranks among the most inexcusable of all the disloyal acts that can be committed against fellow POWs, was a frequent allegation against the Americans tried following repatriation.

The Aftermath of Korea

These two cases have particular relevance to the Korean War prosecutions because of the harsh conditions and brutal treatment of American POWs during their confinement. Many acts of alleged collaboration and misconduct may have been the result of extreme coercive tactics by the captors. Pentagon officials, civilian and military, reviewed a wealth of material that included appeals for surrender, propaganda pamphlets, radio broadcasts, newspaper articles, admissions to using biological and germ warfare, in addition to several thousand pages of bitter accusations from the former POWs themselves. Article 104 of the UCMJ defines collaboration:

> Any person who—
>
> (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
> (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;
> shall suffer death or such other punishment as a court-martial or military commission may direct.[140]

Article 105 deals with other misconduct as a POW:

> Any person subject to this chapter who, while in the hands of the enemy in time of war—
>
> (1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; . . . shall be punished as a court-martial may direct.[141]

Article 105 was added to the UCMJ after World War II primarily because of reports of abuse of fellow prisoners by American captives in that war. The scope of possible acts of misconduct encompassed by Article 105(1) is severely limited by the requirements that the act be done for the purpose of securing favorable treatment for the actor and that it must be "to the detriment" of other prisoners. The phrase "to the detriment" has apparently been construed to mean only direct and immediate actions that result in punishment or deprivation.[142] It also does not include acts of collaboration for which an individual received no favorable treatment.

Even though 41 pilots (34 Air Force and 7 Marine Corps) had admitted to using biological weapons, rather than resort to public trials the air force turned the incidents into a publicity campaign to highlight the abuse the pilots suffered during their captivity.[143] Neither the air force nor the navy seemed eager to press charges against their personnel, reasoning that training had not prepared them for the brutal realities they encountered during their captivity and interrogation. All had publicly renounced any statements made while in captivity. Marine Lt. Colonel Frank Schwable, a highly decorated veteran of World War II, testified that after several months of abuse, "I had lost my sense of judgment." He then said that, given the situation, the idea that one could strictly keep to the name, rank, and serial number requirement could sound good only "to some guy sitting behind a desk in Washington."[144] Of the 49 marines who were investigated for misconduct, only one was administratively separated from the service.[145]

Of the 229 air force repatriates, 83 were accused of collaboration. The air force convened a board of senior officers to review each case and make recommendations. The board found 69 of the accused innocent on all charges. Of the remaining 14, 6 received honorable discharges, and 8 others appeared before a second board; 4 of these received honorable discharges, and 4 others were permitted to stay on active duty.[146]

The army took a different course. Instead of conducting a central review, they decided to decentralize the process. Based on pretrial investigations, each army zone commander (a lieutenant general)[147] would then decide if the evidence merited prosecution. Two army zone commanders could receive comparable charges and evidence and make opposing decisions on the appropriateness of convening a court-martial. Moreover, a large number of the returnees had been discharged and thus were beyond the reach of military law.[148]

The 215 army cases held to warrant further investigation resulted in only 14 trials. Fourteen separate courts-martial meant 14 different prosecutors and 126 “jurors.” This resulted in major inconsistencies because each law officer interpreted the law independently of central guidance. That issue, when combined with decisions about the kinds of evidence accepted by panels, sometimes produced completely opposite conclusions in various cases that involved the same charges. Many witnesses themselves admitted collaborating but were not charged. Major Ronald Alley was prosecuted while several other officers interned in the Yalu camps were not, even though they had admitted to committing the same offenses. The army also explored the possibility of criminal prosecution for treason for those already discharged but were told that the nature of the evidence would not meet the strict evidentiary standards necessary for trials in federal courts.[149]

Secretary of Defense Charles Wilson ordered the secretary of the army to give dishonorable discharges to the 21 Americans who had refused repatriation. This had no precedent. Normally a dishonorable discharge may be imposed only by the verdict of a court-martial or military commission, not through an administrative action. The secretary of the army reluctantly complied with the request. In July 1955, a year and a half after their discharge, William Cowart, Lewis Griggs, and Otho Bell, three of those who had elected not to repatriate, arrived in San Francisco and were immediately arrested by military authorities. In November they became free men. Because of the dishonorable discharge, the army had no authority to try them.[150]

Abu Ghraib: Iraq

Allegations of mistreatment of Iraqi POWs by British and American troops surfaced in May 2003.[151] In late July, the U.S. Army filed charges against four members of the military police accused of hitting Iraqi prisoners and breaking their bones at Camp Bucca in southern Iraq. Eight marines, including the commanding officer, were charged in the death of Nagam Sadoon Hatab at Camp Whitehorse. An investigation into alleged abuses at Abu Ghraib prison outside Baghdad began in January 2004. A full-scale scandal flared in April 2004 when damning photographs of American personnel abusing prisoners were published. Seventeen soldiers, including officers, were removed from duty. The army charged 10 with "maltreatment, aggravated assault, battery, and dereliction of duty." Four were convicted by court-martial. Six others reached plea deals, and all except one received prison sentences. All received dishonorable discharges. The army demoted the commanding officer at the prison from brigadier general to colonel.[152]

Philip Zimbardo, who served as an expert witness for the defense, has argued that the internal expectations and dynamics of certain institutions or systems can influence individuals caught within to do things they "could not imagine doing when they were outside those situational force fields."[153] Zimbardo believes that institutional structures like prisons, if not strictly controlled, can encourage degradation that results from the differential in authority, power, and status between groups. Add to this the factors of ethnicity, peer pressure, and wartime conditions. Zimbardo offers an analogy: "Morality is like a gearshift that at times gets pushed into neutral by circumstances."[154] In terms of the pressures of combat situations on individuals, this statement could apply across the board.

War Crimes and POW Status[155]

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War (July 27, 1929) contained no provision concerning the punishment of crimes or offenses committed by prisoners of war prior to their capture. The ICRC commentary argues that because Article 45 of that convention did not specifically exclude such acts, the drafters probably meant to address only acts committed during captivity. At the end of the Second World War, this gap in the text of the 1929 Convention gave rise to much discussion until sentences were passed in most of the Allied countries. Among the prisoners of war who were nationals of the defeated states were many persons accused of war crimes and crimes against peace and humanity. During the ensuing trials, a number of the accused asked to be afforded the guarantees provided by the 1929 Convention in regard to judicial proceedings.

The United States Supreme Court rejected appeals on behalf of Japanese general Tomoyuki Yamashita on this point, holding that a well-established rule of customary law existed that would deny POW status to those who have violated the laws of war. Therefore, violators of the laws and customs of war could not avail themselves of the protection that they afford because captured members of enemy armed forces who have committed war crimes have no claim to POW status. Second, the lack of reference to the issue in the 1929 Convention clearly showed that the framers had no intention of modifying the current customary rule.[156]

For the ICRC, the move to prosecute POWs for purported war crimes after the war raised many concerns about the validity of the procedures and evidence. For one, it seemed illogical and unjust to prejudge the guilt of the accused, since prisoners were denied the protection of the convention before actually having been found guilty of war crimes. Even assuming that the rule of customary law that was cited actually existed, it can only be applicable after a court has issued its finding. When the International Committee of the Red Cross undertook the revision of the 1929 Convention, it therefore gave immediate attention to introducing provisions that would afford certain guarantees to prisoners of war, even when accused of war crimes, and remove all ambiguity that had resulted from the earlier text.

Article 85 of GC III says, "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." Article 44.2 of PA-I adds that "while all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4." Article 45 of PA-I adds the requirement that any uncertainty about a prisoner's status should be resolved in his or her favor. When ratifying GC III, the Soviet Union and several other states made reservations with regard to Article 85 that sought to vitiate its legal effect. From the standpoint of human rights law, these reservations have no validity.[157]

POWS: SOME INTERESTING QUESTIONS

After the POW experience in the Korean War (see earlier discussion), the United States developed a code of conduct that dealt with expected behavior of American soldiers taken prisoner.[158] The code formed a response to widespread publicity given to the problems concerning what appeared to be breaches of conduct of American POWs captured by the North Korean and Chinese Communist forces in the Korean War.

The code defines an official view of the status of captives and their moral obligations both to the state and to one another. The code clearly states that U.S. POWs must regard themselves as combatants even after their capture and as continuing full-fledged members of a state at war. The obligation ends only with the end of the war, or by death. Issued as an executive order of the president (1955), the code denotes moral, not legal, obligations in that it specifies no penalties for violations. Sections II, III, and IV of the code specify:

> II. I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.
> III. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.
> IV. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

Headings number II and III form the most controversial of these requirements. "Never of my own free will" could perhaps be taken as a bar to surrender under any circumstances other than where individuals have no choice—a shipwreck for example, where the "choice" is rescue and life in captivity or death. Indeed, that wording could be taken as a commitment to fight to the death.

Heading III, if interpreted literally to mean *physical* resistance, runs counter to the requirements in GC III. As a note, it is hard to see why any state at war would maintain prisoners who actually did or tried to do all of the things the code of conduct specifies. It runs quite counter to the idea of benevolent quarantine. Yet, reasonably, the state can and does demand resistance to pressure and inducements to collaborate with one's captors. Such collaboration represents a defection to enlist on the other side. But these decisions might not be questions of a dichotomous black-or-white choice. Under torture, prisoners might eventually break down; refusal to collaborate might place other prisoners at risk. Here one must judge by the integrity of his or her resistance as long as it lasts.). Lucien Bodard wrote of the French experience in Indochina:

> Should one refuse and die, maintaining the integrity of a French officer? Or is it not one's duty to use cunning to pretend to be converted in order to live through it and fight again for one's country another day? But is it possible to pretend without being dragged in, without being a traitor in spite of oneself, and without becoming despicable?[159]

Bodard concluded that it was a predicament "in which even the strongest ended up by no longer know[ing] what he was doing . . . or even what he really thought." No matter the demands of a state, in the end the most important obligations are owed to one's fellow prisoners, not to the state. Rochester and Kiley wrote of the POWs held in North Vietnam: "Even the most by-the-book seniors were reluctant to sanction escape attempts where there were hopeless odds or where failure (or success) could have serious consequences for those left behind."[160]

The Bowe Bergdahl Case

In May 2014, the United States negotiated an agreement with the Taliban that resulted in the return of Sergeant Robert Bowdrie "Bowe" Bergdahl in exchange for the release of five prisoners held at Guantanamo Bay. Bergdahl, then a private (see prior discussion in this chapter about status in captivity) had been taken captive in June 2009.[161] Begdahl's story has resurrected the case of Private Eddie Slovik (World War II), the only American soldier executed for desertion since the Civil War.[162] As the story has evolved, Bergdahl had become very disenchanted with the army and had decided that he had to go to another base to register his complaints directly with the commanding officer. He walked away from his unit and was almost immediately snared by the Taliban. His captivity was not pleasant. He endured endless beatings. After escaping once, on recapture he was blindfolded and placed in a seven-foot cage where he spent most of the rest of his time in captivity. A defense witness, Terrence Russell, who debriefed Sergeant Bergdahl after his release, testified that the sergeant had suffered more in captivity than any American since Vietnam, including beatings with rubber hoses and copper cables, and uncontrollable diarrhea for more than three years.[163]

Bergdahl has been charged with misbehavior before the enemy (Article 99UCMJ) and aiding the enemy (Article 104 UCMJ). An Article 32 hearing under the UCMJ, the equivalent of a preliminary hearing to assess the *prima facie* case in civilian courts, determines the disposition of a case. An Article 32 hearing can recommend no action, or a general, special, or summary court-martial depending on the nature of the offense committed.[164] Bergdahl's Article 32 hearing panel recommended a special court-martial that would have limited possible prison time to one year or less. Instead, after reviewing the case in December 2015, General Robert Abrams, head of Army Forces Command, decided that Bergdahl's case should be tried in a general court-martial, where he could face a life sentence if convicted of misbehavior before the enemy, and he could face five years of prison time if convicted of desertion.[165] At the time of this writing (December 2015), the date of the trial had not been set for early 2017.

POWs and Escape

Another staple film plot centers on escapes from POW camps. GC III has very explicit sections that deal with escape. Article 42 states that "the use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances." The most important, and often violated, requirements are in Articles 91–93. The last paragraph of Article 91 states: "*Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape*" (emphasis added). Articles 92–94 limit the penalties of those recaptured to "disciplinary punishment."

One infamous camp, Stalag Luft III (main camp for aircrew), which housed captured air force servicemen in the German province of Lower Silesia near the town of Żagań (now part of Poland) had two famous escape efforts. Ironically, the Germans selected the site because they believed that the sandy soil combined with the construction of barracks on stilts would make escape by tunneling difficult. They underestimated the ingenuity of their captives. Escapes by tunneling from two different compounds in the complex were depicted in the films *The Wooden Horse* (1950) and *The Great Escape* (1963).

The wooden horse in the film's title is a piece of exercise equipment, a horse ostensibly used for vaulting—an exercise in which the athlete performs a twisting somersault over a form that was originally intended to mimic a horse—that the prisoners used to conceal their escape attempt. The title is also a reference to the Trojan horse used by Greek siege forces to take and sack Troy. Recruiting fellow prisoners to form a team of vaulters, each day they carried the horse out to the same spot, with a man hidden inside. The prisoners exercised using the vaulting horse while the concealed man began tunneling below the horse. At the end of the exercises, the digger placed wooden boards cut to fit the aperture in the hole and filled the space with sandbags and dry sand kept for the purpose. Three men eventually made successful escapes through the tunnel.[166] The POWs that accomplished the "great escape" in 1944 did not fare as well. After digging three tunnels (Tom, Dick, and Harry), 76 POWs escaped; 73 were recaptured. In direct violation of the 1929 Geneva Convention, by direct orders from Hitler the Germans executed 50 of those recaptured.

To return to an earlier theme, the fallout from an ill-advised escape attempt by air force captain John Dramesi and his cellmate Captain Edwin Atterbury from the North Vietnam POW camp named Zoo exemplifies the dilemmas faced by POWs.[167] Major Larry Guarino, senior officer in the main compound, had actively discouraged escape attempts because "the possibilities of an escape of an obvious westerner, out of the city of Hanoi, toward the west into Laos, in our physical condition, with the lack of available clothing and footgear, made the chance of success a big fat zero. . . . Caucasians would stick out like sore thumbs among hundreds of thousands of Asians."[168] In sum, the problem was not in finding a way to break out but in successfully negotiating one's way across a broad expanse of unfamiliar and hostile territory to a safe haven. The North Vietnamese recaptured Dramesi and Atterbury almost immediately. Atterbury died from the subsequent beatings and ill-treatment. The prison staff used the attempt as an excuse to inflict severe punishment (reprisals) on all of the prisoners in all of the camps, thus violating both the prohibition on collective punishment as well as those regarding permissible punishment for escape attempts.

CHAPTER 5

Law and Noninternational Conflict

> The Angolan government came to Kabila's defense because it feared that if the Rwandans won they would strike an alliance with the Angolan rebel leader Jonas Savimbi, the head of the UNITA movement. Zimbabwe and Namibia quickly followed Angola's lead and sent troops to Kabila's assistance. Meanwhile, in alliance with Rwanda, Uganda and Burundi had occupied large chunks of the Eastern Congo.
>
> —Gérard Prunier[1]

REALITIES

As the quote beginning this chapter illustrates, noninternational conflicts often generate very complicated situations because, although the conflict involves a group dissatisfied with the current arrangements for governance, it often has international dimensions because others have interests in either promoting or opposing groups involved in the internal struggle for power and position. Historically, violent internal struggles for power and leadership within various entities most probably have occurred with greater frequency than war between them. Internal conflicts over who rules have a long history. Previous chapters have made reference to Xenophon and the 10,000 Greek mercenaries hired by Cyrus the Younger in his quest to unseat his older brother, Artaxerxes II, King of Persia.[2] The War of the Roses (1455–1487) in England provides another prominent example.[3] This example parallels that of the Congo in that the kings of France and Scotland, as well as the dukes of Burgundy, played the two factions against each other, pledging military and financial aid and asylum to defeated nobles and pretenders in order to prevent a strong and unified England from making war on them. Barbara Tuchman's history of the 14th century in Europe is a chronicle of constant challenges to central authority.[4] In this respect, one should also not forget the American Civil War (1861–1865) and its lasting impact.

Considering the past hundred years, noninternational conflicts have produced a number of cases that involve genocide as well as large losses of life that did not strictly qualify as genocide. Add to that the enormous destruction of property. Demands for self-determination or reform have produced many ongoing NIACs in the contemporary world as well as some that may reoccur. The internal situation in a number of other countries is precarious.[5] Massive human suffering resulting from heavy-handed government response to internal threats is nothing new. The images coming from Syria, Iraq, and other conflicts unfortunately remind one of many previous "internal" armed conflicts fought with great brutality. From the Spanish Civil War to Sierra Leone to Rwanda to Sudan, internal wars have showcased the most heinous acts humans can commit.[6] The Internal Displacement Monitoring Centre estimated that in December 2014, internal conflicts had resulted in *38 million* internally displaced persons.[7]

The problem comes in defining the parameters of noninternational conflict. The rules pertaining to law of noninternational armed conflicts (LONIAC)[8] parallel those in the *ius in bello* for international armed conflicts. However, nothing comparable to the *ius ad bellum* for international armed conflicts applies to NIACs. No international convention defines the elements that determine when an internal disturbance has moved beyond sporadic violence and demonstrations to a more organized threat. Because of the rather diverse nature of internal conflicts, this simple question masks a very complex set of issues involving sovereign rights, recognition, and the nature of the nexus between international and domestic law.

The first problem to emerge after World War II was that posed by "wars of national liberation." According to the Geneva Conventions of 1949, wars of peoples under colonial domination against their administrating power fall into the category of noninternational conflicts. However, these conceptions gradually changed, particularly after 1960, when large numbers of former colonial dependencies gained their independence. The United Nations General Assembly proclaimed a right of self-determination by colonial peoples in several resolutions that declared wars of national liberation to be international conflicts.[9]

A second problem lies with the instability of many regimes, which has led to a large increase in the number of noninternational armed conflicts since 1949. According to estimates, 80 to 90 percent of the victims of the armed conflicts that have taken place since the Second World War are the result of noninternational conflicts. The rudimentary rules of Common Article 3 of the 1949 Geneva Conventions proved insufficient under these circumstances. The need arose to create regulations to address the status of noncombatants parallel to those existing for international conflicts. A third problem stemmed from the increasing number of foreign interventions in civil wars. Interventions in Vietnam, Cyprus, Lebanon, Angola, and other states confirmed that noninternational and international conflicts had increasingly intermingled. The conventions of 1949 contained no provision to cope with the questions raised by such internationalized civil wars.[10]

For an obvious reason, incumbent governments have resisted efforts to clarify the situation. Sovereign states, as independent entities responsible for peace and order in their own territory, have the desire to address any internal violence with measures the government deems appropriate, without interference from others. They prefer to deal with rebels by applying their own national criminal laws free from any constraints that might be imposed by the law of armed conflict. The obverse of this is the reluctance of the international community to acknowledge the extent of a conflict. Events in Central Africa, Chechnya, and the Balkans in the 1990s, and those in North Africa and the Middle East at this writing, provide ample illustrations for this observation. Laurie Blank and Geoffrey Corn note that it took *15 months* before the international community issued a formal declaration that the conflict in Syria had evolved to the point where the LONIAC applies.[11] A similar problem exists with Thailand. Since 2001, all or part of Thailand's four southernmost provinces have suffered from an insurgency that involves variously armed and organized ethnic Malay groups—nearly all Muslims—against the official and predominantly Buddhist Thai state. Over 6,000 people have been killed and thousands more injured.[12]

Note that international law has no prohibitions against a government using violent measures to suppress a rebellion or insurgency. Not surprisingly, international law specifically reaffirms the rights of a recognized sovereign government to suppress rebellions. Article 3(1) of PA-II (1977) states:

> Nothing in the protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government *by all legitimate means*, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State [emphasis added].

Similarly, Article 8(3) of the Rome Statute of the International Criminal Court (ICC) affirms:

> Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, *by all legitimate means* [emphasis added].

Despite these assurances, the term "all legitimate means" perhaps gives states sufficient reason to downplay the nature of rebellions because the LONIAC imposes meaningful restraints on both sides in that both the government under siege and its opponents must not use means or methods that would violate international law.

BELLIGERENT COMMUNITIES AND INSURGENTS: THE TRADITIONAL LAW

The post–World War II era has witnessed many violent internal struggles because communities have sought to achieve independence from a parent country, or groups have sought to secure control of an entire state for their own purposes. No breach of international law occurs simply because a rebel regime attempts to overthrow the government of the state or to secede from the state. Traditional international law treats insurgencies and civil wars as falling within the domestic jurisdiction of the state and hence within its domestic law enforcement regime. Recognition of a state of belligerency implies that the insurgents have gained effective control of territory extensive enough to move the conflict beyond a purely local uprising. In the past, when this point was reached in the development of a rebellion, other states could choose to grant the community a *limited measure of international personality* by recognizing a status of belligerency and terming the group a "belligerent community." Recognition of belligerency did not imply recognition as a state or as a government. The belligerent community is still considered legally an integral part of the state against whose government it is conducting hostilities. The issues here involve judgments about effective control. A state of belligerency signified a stage of an internal armed conflict in which a contender for power exerts effective control over a significant expanse of territory. The community will acquire statehood in the legal sense only if it succeeds in its enterprise, by either achieving independence as a new entity or replacing the lawful government of its state by its own chosen representatives. Until it has such success, certified by recognition from other state members of the international community, the belligerent community possesses only very limited, temporary aspects of international personality.

Legally, this placed on the belligerents, as well as on the government opposing them, responsibility for all violations of the laws of war and for the treatment of foreign property and citizens. Rights acquired by the belligerents then included the rights of blockade, visitation, search and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of "damages suffered" through the conflict by foreign citizens. The recognition does not give the full rights of a sovereign state. A belligerent community lacks the right to send or receive diplomatic agents, to join international organizations, or to benefit from multilateral conventions concerned with peacetime international relations and activities of states. One of the last instances of the recognition of a belligerent community occurred in June 1979, during the then 19-month-old civil war in Nicaragua. The so-called "Andean Group" (Bolivia, Colombia, Ecuador, Peru, and Venezuela) declared that "a state of belligerency" existed in Nicaragua and that the forces of the Sandinista National Liberation

Front represented a "legitimate army." That declaration then permitted the members of the Andean Group to aid the rebels with weapons and other supplies.[13]

Recognition of belligerent communities has posed many of the more perplexing problems connected with recognition. Traditionally, insurgents had to satisfy three criteria: (1) they had to have established at least a rudimentary government and military organization reasonably in operative control of a substantial area of the parent state (or overseas territory, if a colonial revolt); (2) the rebellion had to have reached a stage beyond a mere local uprising—that is, a status equivalent to conflicts between states; and (3) the insurgents had to be capable and willing to carry out international obligations imposed on them.

If other states have satisfied themselves that rebel groups fulfill the criteria, recognition of the rebels as a belligerent community frees the parent state from all international responsibility for the acts of the rebels from the inception of the revolt. This last statement holds true, however, *only* if the parent government has made some attempt, implied in the second criterion, to assert its authority over the rebels.[14] As with all acts of recognition, the right lies solely with each individual foreign state. The acts of the parent state cannot control the policies of others. Hence, even if the lawful government has recognized the rebels as a belligerent community, each foreign state remains free to grant or withhold the same recognition. If the foreign state withholds recognition, then it has a duty to refrain from assisting the rebel group but is free to grant or withhold aid to the lawful government. Likewise, even if the lawful government does not recognize the rebels as a belligerent community, a foreign state retains the right to grant or withhold such recognition. In the contemporary era, these conditions have been openly violated with respect to many conflicts.

In contrast, a rebellion that has not yet achieved the standing of a belligerent community was said to be in a state of *insurgency*—a condition described as intermediate between internal tranquility and civil war. Insurgency means rebellion, riot, or mutiny by a portion of the citizens of a state against the established government. It indicates armed struggle by dissident forces against the established government in a state. Recognition of insurgency normally entailed issuing a proclamation calling public attention to the existence of an insurgent group in a foreign country and cautioning the public to exercise due caution regarding travel, business relations, and other dealings with and in the area in question. Such a proclamation of a state of insurgency did not correspond to the recognition of a belligerent community. Rather it served as a statement of fact. Recognition of insurgency carried with it no special rights for those participating in the fighting.

The traditional law also provided guidance on how other states within the community were to deal, if at all, with revolutionary forces within another state. General Assembly Resolution 2625 provides an unequivocal statement of government obligations:

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[15]

More modern statements send mixed messages. On December 14, 1974, the General Assembly adopted a definition of aggression that included the following actions in Article 3(g): "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State or such gravity as to amount to the acts listed above, or its substantial involvement therein."[16] However, Article 7 states:

> Nothing in this definition, and in particular article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in . . . [G.A. Res. 2625], particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support.[17]

In reality, a double standard exists because Third World leaders tend to see these prohibitions as selectively operative, binding on the two superpowers (though not equally) and those states that once controlled colonies but not on those who act in the name of anticolonialism, antiracism, or other "liberation" rationales. Many believe that active enforcement of the prohibition on these activities would legitimize inequitable regimes by depriving those who would resist of their only viable alternative because they lack sufficient strength to fight using conventional means. This attitude was embodied in the last effort to revise the law of armed conflict. According to PA-I Article 1, international armed conflict now extends to incidents "in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Article 85 describes as a "grave breach" the "practices of apartheid and other inhumane and degrading practices" involving outrages on personal dignity based on racial discrimination.

The General Assembly resolutions lack consistency in terms of provisions. Some call solely for the application of Geneva Convention III (POWs), others for the application of all the Geneva Conventions. Sandesh Sivakumaran concludes that "the general thrust of the resolutions was clear: wars of national liberation could no longer be treated as akin to other noninternational conflicts."[18]

THE GENESIS OF LONIAC

Sivakumaran argues that the origins of LONIAC began with the national Red Cross. He identifies several civil conflicts that occurred around the turn of the 20th century where national Red Cross Societies had offered their services as neutrals: Cuba (1897), Boer War (1899–1902), Venezuela (1903), Nicaragua (1909), Honduras (1911), and China (1912).[19] At the Ninth International Conference of the Red Cross in 1912, the Russian delegate stated what Sivakumaran characterizes as the "prevailing sentiment of the time":

> I further believe that the Red Cross societies could have no duty to perform toward insurgent gangs or revolutionaries which can only be considered as criminals by the laws of my country . . . any offer of services whether direct or indirect, from Red Cross societies to insurgents or revolutionaries could only be viewed as a breach of friendly relations as an unfriendly act, likely to encourage and foment sedition and rebellion in a country.[20]

The subject arose again at the 10th International Conference, resulting in a resolution affirming the right of the Red Cross to afford "relief in case of civil war and social and revolutionary disturbances," noting that "the state of war cannot justify violation of International Law" and that "political detainees in time of civil war should be considered and treated in accordance with the principles which inspired those who drew up the 1907 Hague Convention." However, the resolution also placed responsibility not on the ICRC but on national societies.[21]

The four Geneva Conventions negotiated in 1949 included Common Article 3:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed "hors de combat" by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages on personal dignity, in particular humiliating and degrading treatment;

> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

At the time of its adoption in 1949, many saw Common Article 3 as a "mini-convention," a self-contained article that did not depend on any other provisions within the four conventions. Aside from Common Article 3, the four 1949 Geneva Conventions have no relevance for noninternational conflicts. More importantly, Common Article 3 gives no guidance concerning the parameters that might define a "conflict not of an international character." The International Court of Justice in the Nicaragua case (1986) found Common Article 3 declaratory of customary international law in that it formed "a minimum yardstick" for both international and internal armed conflicts, in addition to the more elaborate rules applicable to international armed conflicts.[22] Yet, in its reasoning, it did not elaborate any criteria concerning the measurements that might define the markers on the yardstick in determining when Common Article 3, vague as it is, might apply to an internal situation. The phrase "conflict not of an international character" also appears in Article 19 of The Hague Convention on Cultural Property adopted in 1954, but again without any additional elaboration concerning thresholds that might trigger its application. Only with the negotiation of the two Protocols Additional (1977) to the four Geneva Conventions did the differences between international and noninternational conflicts receive explicit clarification in treaty form.

Additional Protocol II deals exclusively with noninternational conflicts, but it does not supersede Common Article 3. Article 1(1) of PA-II states that it "develops and supplements" Common Article 3 without "modifying its existing conditions of application." Because not all states have ratified PA-II (the United States has not), the pertinent question becomes to what extent the provisions of PA-II can be regarded as declaratory of customary law. Consider that treaties may reflect a codification of customary law at their inception but can also generate new rules of customary law through general observance by a great number of states.

Proving that a customary rule of international humanitarian law exists faces severe obstacles. *Opinio juris* consists of three elements: a pattern of claims, an absence of protest by states particularly interested in the matter at hand, and acquiescence by other states. When a new rule contradicting a prior rule is maintained by a large number of states, the protests of a few states will not overrule it. In general, the absence of reaction by other states can be seen as reinforcing the new rule. However, new customary rules will not be binding on states that have consistently put forth objections to the claims made by other states.[23] A large number of humanitarian norms consist of prohibitions. Hence, one must prove that the decision not to do something flowed from adherence to a legal obligation (*opinio juris*) and not from a simple pragmatic calculation. Finding definitive proof of why something did not happen always forms a formidable task. That issue formed part of the reasoning in the *Lotus* case, where the PCIJ argued that although states in the position of Turkey in the litigation at hand had refrained from asserting a right to prosecute, there was no evidence that they did so out of a perception of a legal obligation not to undertake action:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.[24]

Beyond that, in order to demonstrate general state practice with regard to compliance with a prohibition means that one needs to find evidence of inactivity or omissions by states that have the technological capability of behaving in a particular way in a specific situation. States tend to provide justifications when they do something, not when they refrain from doing something.

A second vital observation comes from the fact that, by definition, state practice in the area of international humanitarian law occurs only in periods of hostilities and armed conflict. Events since the early 1990s may generate an impression that armed conflict is all around us. All things considered, the instances where state behavior in armed conflict, or lack of it, can be observed are not that frequent even though a few high-profile situations continue to dominate contemporary headlines.

A third observation comes from the imprecise nature of the LONIAC. Dinstein writes: "It is an irrefutable fact that, even though humanitarianism is always a consideration, many of these rules are engendered primarily by military necessity."[25] There exists a wide regulatory gap between the two main categories of armed conflict. The 1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles. Of these, only Article 3, common to the 1949 Geneva Conventions and the 28 articles of 1977 PA-II, apply to internal conflicts. Circumstances make it very difficult for outside observers to make discriminating judgments about state behavior in response to rebellion. In this respect, many advocates tend to downplay the element of state practice (and *opinio juris*) because of their commitment—they assume that "noble humanitarian principles that deserve recognition as positive law of the international community" should govern.[26]

The case law that has emerged from the ICTY and ICTR illustrates the struggles courts have had in applying the LONIAC. It reflects in part what Sonja Boelaert-Suominen has termed the "two box system" where the two types of conflicts are considered as separate and distinct rather than reflecting the reality of what might be called a modern *status mixte* in that the dividing line between the two has often become very blurred. As Morton Kaplan and Nicholas Katzenbach noted many years ago in their commentary on war, "The world of the lawyers was divided into war and peace; the world of the statesman saw intermediary stages in the political process."[27] This divorce between legal dichotomies and the practice of states has always placed a great strain on the ingenuity of the legal fraternity. It is in the attempt to deal with the lack of congruence between the world of the lawyer and the world of the statesman that Giradoux's description of international law as the "training ground for the imagination" becomes most applicable.[28] In the play, Busiris, a famous international lawyer, is visiting the court at Troy. Hector asks him to use his legal expertise to determine if the Greek fleet sailing into the harbor is hostile or friendly. Busiris goes up on the walls and observes, then gives a very long and convoluted report that concludes that the fleet has hostile intentions. Hector, not satisfied because he wishes to avoid a war, asks him to take a second look. Busiris, now sensitive to Hector's wishes, engages in an exercise in "lawfare." Citing the same set of "facts," he now concludes that the fleet is on a peaceful mission.

Because of its roots in treaties, as well as the relatively recent role of international prosecutions assessing when the LONIAC applies, the meaning of armed conflict has become increasingly legalistic. Indeed, a shift in emphasis from a practical and pragmatic factual assessment to a legalistic "test" is reflected in what many today apply as an "elements" test: unless certain proposed elements can be independently verified, a situation cannot be designated an armed conflict, even when the totality of the facts and circumstances cry out for international humanitarian legal regulation.[29]

In the *Tadić* jurisdiction decision (October 1995), the Appeals Chamber of the ICTY held that the grave breaches regime of the Geneva Conventions applied only to armed conflicts of an international character, including cases of total or partial occupation by one state of the territory of another.[30] However, the Appeals Chamber also suggested that a change in customary law was occurring so that the grave breaches regime may eventually become operative regardless of whether the armed conflict is international or internal:

> We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[31]

Progress has been slow, but in the *Čelebići*, the Appeals Chamber of the ICTY wrote that "to maintain a legal distinction between the two legal regimes and the criminal consequences in respect of similar egregious acts because of the differences in the nature of conflicts would ignore the very purpose of the Geneva Conventions."[32] Article 8.2 of the Rome Statute of the ICC enumerates 16 violations that constitute war crimes or grave breaches that can occur in conflicts defined by Common Article 3.

In the United States, the War Crimes Act established personal criminal liability for U.S. personnel who violated Common Article 3.[33] The Military Commissions Act of 2006 (MCA) provided a U.S. specification of grave breaches of Common Article 3: torture, cruel or inhumane treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault and abuse, and taking hostages. This differs somewhat from the offenses listed in the article.[34] The act has come under considerable criticism for its presumptive conflation of Common Article 3 and international armed conflict obligations in the Geneva Conventions.[35] Moreover, the MCA does not define "hostilities" or explain what conduct amounts to "supporting hostilities." The law would only apply to individuals within U.S. jurisdiction. One state cannot alter the terms of treaty in a manner binding on others.

PROTOCOL ADDITIONAL II

To reiterate an important point, leaving aside Common Article 3, the four 1949 Geneva Conventions have almost no relevance to noninternational conflicts. In contrast to the 91 substantive regulatory articles of PA-I (1977), PA-II has only 18 substantive regulatory sections. First, it specifically excludes wars of national liberation and similar conflicts covered by PA-I. Second, it sets a minimum threshold for other types of internal conflicts: it applies

> to all armed conflicts which are not covered by Art. 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

Victims of International Armed Conflicts (PA-I) and which take place in the territory of a High Contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operation and to implement this Protocol.

Paragraph 2 of Article I provides that the protocol "shall *not* apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts" (emphasis added).

The above provisions divide armed conflicts into five categories: (1) classic interstate conflicts, in which armies of two states face each other across state borders; (2) certain wars of national liberation as circumscribed in PA-I (1977); (3) internal wars or armed conflicts "not of an international character" mentioned in Common Article 3 of the four Geneva Conventions and Article 19 of The Hague Convention on Cultural Property; (4) noninternational armed conflicts defined in PA-II (1977); and (5) other internal (armed) conflicts as disturbances and riots that fall below the thresholds of Article 3 of 1949 and PA-II (1977). The first two categories constitute international armed conflicts, the third and the fourth noninternational or internal armed conflicts. Still, as Jelena Pejić has recently noted, "no definition would be capable of capturing the factual situations that reality throws up"; nevertheless, as she suggests, "a certain intensity of hostilities and the requisite organization of the non-state armed group are generally deemed indispensable for categorizing a situation of violence as a non-international armed conflict."[36]

Grave Breaches, War Crimes, and Jurisdiction

One of the weaknesses of international law with respect to defining a NIAC is what entity or agency has the authority to decide that a conflict has risen to the status of a NIAC. The government of a state facing an internal conflict more often than not will regard the rebels as common criminals to be dealt with as they see fit. So long as the state seems in control and capable of dealing with the conflict through its own devices, a case can be made that the LONIAC does not apply because the situation represents an internal security problem. The issue of applicability arises when rebels have gained control of territory, or the conflict has significant impact on others outside the state. The ICRC has suggested that for Common Article 3 to apply, an internal conflict must satisfy four conditions:

1. That the party in revolt has an organized military force that controls a portion of state territory and can be held responsible for its actions
2. That the legal government has resorted to regular military forces as the means of dealing with the conflict

3. That the legal government has recognized the insurgents as belligerents and that the dispute has been referred to either the UN General Assembly or Security Council
4. That the insurgents have an organization purporting to have the characteristics of a state in that it exercises de facto control over persons with a defined territory.[37]

In the real world, few conflicts have met these standards. To complicate the issue, revolutions and coups d'état in and of themselves do not constitute NIACs, although a coup d'état may be a prelude to a NIAC. As Solis notes, frustration arises from dealing with nonstate entities that employ guerilla tactics and who are willing to ignore humanitarian norms in pursuing their goals.[38] In passing, one should note that the motives and goals of insurgents have no relevance to the calculus of determining the existence of a NIAC nor to the application of the LONIAC.

More so than in the case of international armed conflict, the domestic legal system of states involved in noninternational conflicts will play a great role in addition to the LONIAC. States may also have chosen to incorporate the prohibitions of the LONIAC into their own legal code (see chapter 3). Apart from international law, states have an unquestioned right to arrest and punish any individual who commits an offense, whether an ordinary crime or a war crime, within legitimate claims to national jurisdiction. Such jurisdictional claims can be based on territory or nationality. States have the right to regulate the activities of their own nationals if they choose to do so, and they clearly have the right to police their own territory. In certain instances where the LONIAC applies, international courts may have *concurrent* jurisdiction but will defer to national courts if they have initiated proceedings. Normally, as with the ICTY, ICTR, and the Special Court of Sierra Leone (SCSL), international courts become venues because national courts cannot or will not exercise their authority to prosecute violations.

We must distinguish between ordinary crimes and war crimes. Ordinary crimes like rape, larceny, and murder happen in peacetime. They also occur in the extraordinary circumstances of noninternational conflict, but they could occur independently of the events that define the conflict. Ordinary crimes that take place during a noninternational conflict are not necessarily war crimes. Just because a conflict meets the rather vague tests that define a NIAC does not mean that all criminal violations can be connected to the conflict.

A war crime is a serious (grave) breach of IHL. For a war crime to occur, there must first be a situation defined as an international or noninternational conflict. To quote the Trial Chamber in the *Delacić et al.* case (ICTY, 1998), "There must be an obvious link between the criminal act and the armed conflict."[39] The nexus between a war crime and a NIAC must be direct because war crimes entail individual criminal liability. Just because a crime occurs within a NIAC does not mean it necessarily has a connection to the NIAC. Conversely, some war crimes, such as rape, might be committed for purely private ends unrelated to the publicly stated goals of the conflict. In *Kunarac et al.* the Appeals Chamber of the ICTY maintained:

> What ultimately distinguishes a war crime from a purely domestic offense is that a war crime is shaped by or dependent on the environment—the armed conflict—in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal of the crime . . . if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict.[40]

Dinstein observes that "the most egregious tableau in which ordinary crimes committed by insurgents can still have a nexus to the NIAC is that of an insurrection stoked by criminal motivations."[41] Drug production and smuggling have played a part in many NIACs.

NIACs raise an interesting question of scope, or geographical boundaries. In a NIAC, does the LONIAC apply to all regions within a state equally or just to those in which active conflict is taking place? Sivakumaran notes that international criminal tribunals seem to have adopted the view that "international humanitarian law continues to apply in . . . the whole territory under the control of a party, whether or not actual combat takes place there."[42] However, given the nature of contemporary NIACs, imposing geographic restrictions could overly narrow the applicability. Many NIACs involve fighters who use the territory of a border state for staging or as a safe haven. For example, in the early years of the 21st century, members of Fuerzas Armadas Revolucionarias de Colombia (FARC) used Ecuadorian and Venezuelan territory for bases. The Lord's Resistance Army (LRA, Uganda) had bases in South Sudan. In spite of the cross-border element, no one disputes the noninternational character of these conflicts.

In terms of the legal conundrums that can arise when considering the status of the parties to a NIAC, despite the rulings of ad hoc tribunals, the location of the actual fighting should not govern the application of Common Article 3 or PA-II. Sivakumaran argues that what is important is the focus, which should emphasize "armed conflict" rather than geography or the status of the parties. Once the provisions defining an armed conflict are met, "the Protocol (PA-II) is applicable to all aspects of the conflict, regardless of whether or not the hostilities cross a geographical border."[43] PA-II itself provides an important link in that Article 2(1) says that the "Protocol shall be applied to . . . all persons affected by an armed conflict." The ICRC commentary makes clear that the applicability of the protocol relates to persons, not places.[44] This, then, would cover cases like Somalia, where a government has simply disintegrated as a result of a NIAC, and the conflict involves two or more armed groups fighting to replace the failed government.

Killing in a NIAC

Unlike international armed conflicts, the act of killing in a NIAC may be considered murder. In this regard, one must remember the context and the fact that the LONIAC may apply, but so does the domestic legal system of the affected state. Consider that an agent of the state killing an insurgent will be justified, while that of an insurgent killing an agent of the state will generally be considered murder. From the vantage point of the domestic legal system, murder is murder. Simply, apart from the rules relating to noncombatants, the LONIAC contains no language that would help differentiate between lawful killing and murder. As Dinstein notes, curiously the three terms associated with the LONIAC—acts of hostility, ordinary crimes, and war crimes—do not make a material difference from the vantage point of domestic law. In sum, an insurgent who kills in the course of hostilities does not enjoy a more advantageous position compared to an ordinary criminal or a war criminal.[45] In contrast, from the perspective of the LONIAC, for an international penal trial to occur, jurisdiction will depend entirely on whether a war crime has been committed.

In Common Article 3 conflicts, unlawful combatants are the rule. The wording and logic of Common Article 3 (GC I-IV) and Additional Protocol II (PA-II) makes clear that civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories in noninternational armed conflict.[46] In an armed conflict between a state and an organized armed group such as al Qaeda, the organized group will seldom meet the criteria to enjoy "combatant's privilege," even if it does constitute the armed forces of a nonstate party to the conflict.

More difficult is the concept of membership in organized armed groups other than dissident armed forces. Membership in irregularly constituted groups obviously has no basis in domestic law and usually does not involve uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there can be various degrees of affiliation with such groups that do not necessarily amount to "membership" within the meaning of IHL.[47] In one case, affiliation may turn on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions of clan or family. In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a nonstate party to the conflict and its armed forces:

> For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse . . . [U]nder IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes *a continuous function for the group involving his or her direct participation in hostilities*.[48]

The addition of the idea of a distinction based on functionality in context, "continuous combat role," rather than formal requirements for identification, constitutes a new concept and approach that dates only from the 2009 ICRC commentary. The word "continuous" does not mean that insurgents taking a temporary break from participation in hostilities have noncombatant status. They remain a lawful target.

CASE STUDIES: HONDURAS, EL SALVADOR, NORTHERN IRELAND, AND SOMALIA

These four conflicts illustrate the difficulties that come with trying to define a threshold between thuggery, riots and sporadic terrorism, and a full-blown NIAC. To build on Pejić's suggestion discussed earlier in this chapter, only two key questions apply:

1. Did the violence that occurred at any time represent more than merely internal disturbances or tensions that needed to be dealt with purely within the scope of domestic law enforcement?
2. Did the organization of participating armed groups satisfy the criteria for noninternational armed conflict?

Honduras and El Salvador

The conflicts in Honduras and El Salvador provide vivid examples of international conflicts that do not meet the operational criteria that define a NIAC. In terms of murders per capita, the two vie for the distinction of having the highest murder rate outside of states with active war zones. The ongoing level of violence has created a great number of displaced persons.[49] However, the stakes in the conflict reflect private, not public, ends. In both countries the violence comes from conflict among rival gangs, primarily Barrio 18 (*Mara Dieciocho*) and Mara Salvatrucha, who desire to expand their criminal enterprises: drugs, extortion, and prostitution. In discussing Central American gangs, a distinction has to be made between *maras* and *pandillas. Maras* have transnational roots tied to immigration patterns, while *pandillas* are localized, home-grown gangs that have long been a historic feature of Central American societies.[50] Barrio 18 and Salvatrucha are the only two *maras* currently operating in El Salvador and Honduras, although they have reportedly begun to extend into southern Mexico as well.

The contemporary origins of the *pandillas* stem from the aftermath of the signing of peace accords during the 1990s, when demobilized combatant youths in Nicaragua, El Salvador, and Guatemala returned to their home communities and found themselves facing situations of heightened uncertainty, insecurity, and socioeconomic flux. Drawing institutionally on a traditional organizational vehicle for collective youth action, some of these young men formed *pandillas* as localized vigilante-style self-defense groups in an attempt to provide a measure of order and predictability for both themselves and their local communities.[51]

The origins of the *maras* begin with the 18th Street (Barrio 18) gang in Los Angeles, founded by Mexican immigrants in the Rampart section of the city in the 1960s, although it rapidly began to accept all Hispanics. Barrio 18 grew significantly during the late 1970s and early 1980s as a result of an influx of Salvadoran and Guatemalan refugees who sought to join the gang in order to feel included as outsiders in the United States. In the latter half of the 1980s, a rival group, the Mara Salvatrucha (a combination of *salvadoreño* and *trucha*, meaning "quick-thinking" or "shrewd" in Salvadoran slang) founded by a second wave of Salvadoran refugees emerged. Barrio 18 and Mara Salvatrucha rapidly became bitter rivals and frequently fought each other on the streets of Los Angeles.[52]

The two groups were heavily involved in the violence and looting that accompanied the 1992 Rodney King riots, which led the State of California to implement strict antigang laws. The mounting violence led to prosecutors charging young gang members as adults instead of minors, sending hundreds to jail for felonies. In 1996, the U.S. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act that mandated that non-U.S. citizens sentenced to one year or more in prison could be repatriated to their countries of origin once they had served their prison terms. Foreign-born felons who had American nationality could also be stripped of their citizenship and expelled once they had served their prison terms. As a result, between 1998 and 2005, the United States deported nearly 46,000 convicts to Central America, in addition to 160,000 other illegal immigrants caught without the requisite permanent residence permit.[53]

Many of these deportees were members of the 18th Street and Salvatrucha gangs who had arrived in the United States as toddlers but had never secured legal residency or citizenship. They had joined the gangs as a way to feel included in a new country that often actively impeded their integration. On being sent back to countries of origin that they barely knew, deportees reproduced the structures and behavior patterns that had provided them with support and security in the United States. They swiftly founded local *clikas*, or chapters, of their gang in their communities of origin; in turn, these *clikas* rapidly attracted local youths and either supplanted or absorbed *pandillas*.[54] Each *clika* became explicitly affiliated with either Barrio 18 or the Mara Salvatrucha. *Clikas* from different neighborhoods affiliated with the same *mara* will often join together to fight other groupings claiming allegiance to the opposing *mara*, but the gangs have not developed an overarching structure under a single chain of command. Although the *maras* can be conceived of as loose networks of localized gangs, they do not necessarily communicate or coordinate with each other, either within or between countries.[55]

Most policy makers stress the necessity of implementing regional law enforcement solutions to the gang problem by upgrading the capacity and resources to target gang leaders effectively, share data, and conduct thorough investigations that lead to successful prosecutions. Working with the governments in the two countries, the U.S. government has developed and implemented an interagency antigang strategy based on more effective policing methods that emphasize seven key areas: investigative capacity, legal capacity, intelligence capacity, community policing, prevention, and improving coordination mechanisms between the various implementing agencies.[56]

Northern Ireland

In 1641, some Catholic landowners in Ulster engaged in an uprising that resulted in the death of 2,000 Protestant settlers in an effort to offset the policies of the governor, Thomas Wentworth (Earl of Strafford). It quickly spread to the south. Nicholas Canny states that "the many atrocities that were committed were greatly exaggerated in the telling in England and in Scotland."[57] The idea that the spread of Catholicism meant the extension of Roman political power, which they viewed as anti-English in sentiment and policy, was an article of belief strongly grounded in the mind of every Englishman. Given that Charles I was facing the possibility of a civil war, he could not take decisive action, but divisions among the Irish Catholic ranks muted the impact. Not until 1649 did the new Puritan government under Oliver Cromwell turn its attention to avenging what they saw as a widespread massacre of Protestants. Cromwell initiated a campaign that had three goals: the elimination of military resistance to government authority; the removal of all priests and landowners who had any part in the insurrection; and the promotion of a campaign that would convert the entire population of Ireland to Protestants. He sent a well-trained force of 20,000 that quickly eliminated all military opposition. "Priests were hunted down with such energy that the entire Catholic Church structure that had been erected with such painful dedication was swept aside in a few years. All Catholic estates were confiscated."[58] The restoration of the king brought restoration of property to loyal royalists who had fled to France, but Charles II refused to undo the land settlements made by Cromwell. Hence, the amount of land under Catholic ownership remained very limited. The only benefit came from the fact that the new regime was more interested in promoting Protestantism than in persecuting Catholicism.

James II succeeded to the English throne in 1685. James appointed Richard Talbot Lord-Lieutenant of Ireland with the title Duke of Tyconnell. Talbot began to restore privileges to Catholics and recruit a Catholic army presumably to be at the king's service. His actions caused alarm among Protestants in both Ireland and England. In 1688, William of Orange (William III of England) and his wife, Mary, both Protestants, forced James II (William's father-in-law), a Catholic, to abdicate. The Battle of the Boyne in 1690 between William and James II effectively ended James's effort to regain the crown. This battle ensured the continued Protestant ascendancy in Ireland. Protestants in Northern Ireland still celebrate "King Billy's Day" (July 12).[59]

When the Irish Republic gained its independence from England in 1922, the six northernmost counties refused to follow, preferring to remain under British rule. Despite popular belief that the conflict revolved around religious differences, it actually had primarily political roots, although it had a sectarian dimension. The problem for the UK in Northern Ireland came when the situation turned violent in 1969 with the reemergence of the Irish Republican Army (IRA), a terror group considered to be the armed wing of the Sinn Féin political party.

To understand the role of the IRA in the Troubles, it is necessary to understand the split that occurred shortly after their outbreak in 1969. The "old" IRA had decided to recognize the sovereignty of the Irish Parliament in Dublin. As the IRA became active in Northern Ireland, the issue became the constitutional future of Northern Ireland. The acrimony between new "constitutionalists" in the IRA who did not wish to join with the South and those who regarded them as traitors was exacerbated when the "old" IRA failed to defend the Catholic enclaves in the North—in particular in Belfast—when they came under attack from Protestant mobs. The handful of IRA men who rushed to the defense of these areas in 1969 became the founders of the Provisional IRA (PIRA) the following year. Their comrades in the "old" IRA became known as the Official IRA.[60]

Dissension within the PIRA over support for the Northern Ireland peace process resulted in the formation of two more radical splinter groups: the Continuity Irish Republican Army (CIRA) and the Real Irish Republican Army (RIRA). Because the original IRA faded into obscurity, the PIRA is often referred to as just the IRA to distinguish it from RIRA and CIRA. Neither the IRA nor the splinter groups had a religious origin—they were nationalist and Marxist-atheist organizations.[61] Claiming the conflict is all about religion masks deeper divisions. Political divisions do not flow from doctrinal disputes, and ordinary people rarely cite religion as a reason for their fears.[62] The conflict in Ireland was and is about national identity and sovereignty and not about being Catholic or Protestant. Unlike al Qaeda, religion is not what drove the paramilitaries.

In the North, the Catholic minority faced discrimination for jobs, housing, and fair treatment before the law. On the other side, Protestant "unionists" controlled the patronage that doled out government jobs, and they remained passionately loyal to British rule. Throughout much of the 20th century, Northern Ireland's shipyards, linen mills, and other manufacturing hubs played an important role in the economy of the British Empire. Catholic residents did not benefit from this prosperity. When the conflict the Irish call "the Troubles" erupted in 1969, the Catholic unemployment rate in some parts of the province topped 30 percent.[63] In the late 1960s, reacting to the long-standing overt discrimination against Catholics, civil rights marchers began to engage in civil disobedience and were met by violent crackdowns from the Protestant-dominated Royal Ulster Constabulary, the police force for Northern Ireland. The mounting scale of the disorder led successive UK governments to intervene. In 1969, the situation became so serious that Britain sent troops to help restore order. By 1972, things had deteriorated to the point that the British government suspended the Northern Ireland Parliament and imposed direct rule from London.[64]

At this time, the Provisional Irish Republican Army (PIRA), the main republican paramilitary organization in Northern Ireland, was uninterested in any solution short of British withdrawal and Irish unification. For their part, the major "loyalist" paramilitary organizations of the Ulster Defence Association (UDA) and the Ulster Volunteer Force (UVF) had resolved to use violence to resist republican paramilitaries and to oppose Irish unification.[65] At first, the provisional IRA, or "provos," conducted sniper attacks, assassinations, and several small bombings in the province and appeared to have little public support. Then, in January 1972, British troops opened fire on a Catholic rally in Derry/Londonderry, killing 14 unarmed people. PIRA recruitment soared, and the official wing of the organization fell away into obscurity. When secret talks with the UK government in 1972 collapsed, the IRA leadership resolved to remove British presence in Northern Ireland through a war of attrition. The PIRA proceeded to launch a series of bombing campaigns around Northern Ireland and in Britain, targeting both military targets and civilian populations. The "loyalist" groups determined to retain British rule challenged them. In the resulting crossfire, along with the actions of British military and northern Irish police forces, some 3,600 people would die before a peace accord was signed in the late 1990s.

In the early days, the UDA was not regarded as a "terrorist" organization, but that changed as the UDA also spawned violent offshoots that operated under the aegis of the Ulster Freedom Fighters (UFF), most of whom had dual membership with the UDA. The UFF targeted and killed innocent Catholics as a means to force their communities to put pressure on the IRA to end its campaign. By the beginning of the 1990s, the UFF had focused its tactics on targeting and killing known republicans, be they members of the IRA's political wing, Sinn Féin, or suspected members of the IRA itself. Scandalously, information emerged later that confirmed that members of the Royal Ulster Constabulary Special Branch and a secretive British army intelligence cell known as the Force Research Unit had assisted the UFF in their targeting.[66]

The UK did not treat this as an armed conflict but as a situation of law enforcement. The early months of the sectarian violence (from 1969 to some point in 1971) did not constitute an armed conflict because of the nature of that violence and the inadequate organization of the relevant nonstate armed group (IRA/PIRA). The British government never formally acknowledged that the violence generated by PIRA or any other nonstate armed group reached the Common Article 3 threshold. Instead, they stressed the criminal nature of the activities and the ability of domestic measures to deal with the problem.[67] From mid-1971 onward, however, during the PIRA insurgency, a noninternational armed conflict did exist that reached the Common Article 3 threshold.[68] The British did, however, manage to reduce the violence to a level below the threshold as the insurgency failed and as PIRA resorted to techniques more commonly associated with a campaign of terrorism. From 1974 onward, PIRA certainly met the organizational criterion; the key issue is whether or not the criterion of level or intensity of violence was met.[69]

While the rules for the application of force (rules on opening fire) promulgated by the parties are an important factor to be taken into account when analyzing the characteristics of any armed conflict, in the case of Northern Ireland one clear difficulty is the absence of any reliable source material establishing the existence of any such rules promulgated and applied by PIRA. Although it argued until 1986 that it was engaged in a national liberation struggle that enabled it to regard itself as fighting an international armed conflict, the PIRA seems throughout the period to have been disregarding important rules of international humanitarian law, especially the principle of distinction. In the absence of any evidence of PIRA rules on opening fire but certain evidence of serious noncompliance with international humanitarian law, the assumption is that there were no PIRA rules. In contrast, there is clear evidence of rules applied by the security forces.[70]

A final consideration is whether any phase of the hostilities could be classified as an international armed conflict (notwithstanding PIRA's belief that it was engaged in a liberation struggle). During the entire period, hostilities were largely contained within Northern Ireland, although they did spill over into both the wider UK and into other states, most notably the Irish Republic and parts of Western Europe. The PIRA assassinated the UK ambassadors in both Dublin and The Hague (1976 and 1979 respectively), and Lord Mountbatten at his holiday home at Mullaghmore in the Irish

Republic (August 1979). In 1980, PIRA admitted targeting British armed forces personnel based in West Germany. The British also mounted counterterrorist operations beyond the UK, most markedly in the British overseas territory of Gibraltar in 1988. Intelligence sources had reported that the PIRA had planned an attack on British forces there.[71] The extension of PIRA's operations to the UK mainland, West Germany, and elsewhere on the continent were, at most, evidence of a noninternational armed conflict conducted on a foreign state's territory. The obvious and largely uncontroversial conclusion must be that the violence in Northern Ireland and elsewhere did not meet the standards that define an international armed conflict.

Somalia

Somalia became one of the first states to disintegrate in the post–Cold War world of emergent nationalisms and violence. Once heralded as the one true nation-state in Africa, in the 1990s Somalia experienced a brutal, politically created famine and genocide, together leading to the death of a third of a million people and the flight of a million refugees.[72] Ioan Lewis writes: "Although the Somalis had, prior to their colonial partition, a strong sense of *cultural nationalism*, they did not constitute a single, united *political* unit. Political unity, based on kinship pervasively traced in the male line, stopped short of the culturally define nation which was internally divided into a myriad of competing lineages."[73] The explanation of traditional hatreds based on Somalia's clan structure does not completely clarify why clan tensions should suddenly erupt on a grand a scale or with such brutal devastation, apparently for the first time in history.[74]

The primary conflict in Somalia did not involve a state, although the United States and Ethiopia did provide assistance at the invitation of, and in coalition with, the Somali Transitional Federal Government. In the imperial era of the late 19th century, Britain, Italy, France, and Ethiopia subdivided the territory inhabited by the Somalis, a self-identified ethnic group whose origins have been traced to common ancestors that may be somewhat problematic. The colonial legacy of artificial boundaries took on enormous significance in a pastoral economy because it separated family members from each other and from critical grazing areas. In addition, different colonial histories, languages, and political systems contributed to continuing regional distinctions in the postcolonial era.[75] The Somali Republic became the official name of Somalia after independence on July 1, 1960, following the union of the Trust Territory of Somaliland (the former Italian Somaliland) and British Somaliland. Djibouti (French Somaliland) remained separate, gaining its independence much later, in 1977. The Ogaden region remained under control of Ethiopia.

In 1969, Major General Siyad Barre led a successful coup that overthrew the postcolonial parliamentary democracy and established the Supreme Revolutionary Council as the ruling body. Russian aid in the early years of the Somali Republic provided funds for equipping and modernizing the army. In 1975, the Soviet Union made available to the Somalis roughly $63 million in economic credits and grants (out of $67 million for all of Africa). The credits and grants went toward projects such as factories for milk and meat, port-dredging operations, and the Fanole Dam project.[76] In July 1974, a Treaty of Friendship and Co-operation between the Soviet Union and the Somali Democratic Republic formalized the economic and military agreements. Despite Siyad's espousal of Marxist-Leninist "scientific socialism," most Somalis disliked the new alliance. David Laitin argues that Siyad permitted the continuation of the alliance because he saw it as the only way to equip the Somali army so that it could support the Western Somali Liberation Front, which sought to reclaim the Ogaden from Ethiopia.

Even though the Soviets did not overtly support the effort, Siyad assumed that the Soviets would be compelled to support Somalia's foreign-policy goals because of the considerable commitment already made and their need for Somali ports.[77] In this presumption, he made a substantial error. When the radical Derg (Provisional Military Administrative Council) ousted Ethiopian emperor Haile Selassie in a 1974 coup, Moscow sought to establish ties with the new Ethiopian regime despite the fact that the Soviets knew the move would be unacceptable to Siyad. In December 1976, the U.S.S.R. signed a military agreement with Ethiopia. Soon afterward, Soviet advisers began to leave Somalia, many of them going directly to Ethiopia.[78] Somalia invaded the Ogaden in late July 1977. Finding itself supplying both sides of a war, the Soviet Union attempted to mediate a cease-fire. When the effort at mediation failed, the Soviets abandoned Somalia, shifting their support totally to Ethiopia. The war ended when Somali forces retreated back across the border and a truce was declared.[79]

The Soviet shift in support to Ethiopia motivated Siyad to seek allies elsewhere. In the aftermath of the breakdown in relations between Somalia and the Soviet Union, Cold War geopolitics triggered interest from the United States in Somalia. The United States saw Somalia as important because of its proximity to the Middle East and the Persian Gulf. From 1980 to 1988, the United States provided $163 million to build military bases in Somalia capable of monitoring affairs in the Gulf and four times that amount in economic aid.[80] Still, following the loss of the Ogadeen war, Siyad's policies in the north began to generate a revolt among the Isaaq, the largest northern clan-family, who felt excluded from an active role in politics and access to state resources.[81] In 1988, Siyad ordered the bombing and strafing of northern towns, villages, and even rural encampments in response to local Isaaq-led uprisings against his government. By 1989, a series of reports documenting the human rights abuses of the regime, including massacres of rival clans and torture, led to a sharp reduction in U.S. aid. During the next two years, the insurrection that had started in the north spread. Various resistance groups, particularly the Somali National Movement of the north and the United Somali Congress (USC) of the central area fought to overthrow the Siyad regime.

The Siyad Barre government collapsed in January 1991 when the USC captured Mogadishu. The fall of the government began a descent toward total disintegration. Following Siyad's flight from Mogadishu, southern Somalia degenerated into a war between various resistance leaders and their followers over power and territorial control, and among dozens of other splinter factions over food and access to water. Barre's forces maintained strongholds in the inter-riverine regions of the country for almost a year, during which they pursued a scorched-earth policy. Drought conditions and the scorched-earth campaign led to the displacement of farmers from their lands, which resulted in a devastating decline in food production in this important agricultural area.[82]

The opposition groups were all clan-based organizations each fighting for a particular clan interest. Some of the groups focused their activities on areas historically controlled by their respective clans. The Somali National Movement operated in the Issaq-inhabited areas of northern Somalia; the Somali Salvation Democratic Front in the Mudug region primarily inhabited by Majerteen; the United Somali Congress in the Hawiye territory of the central regions; and the Somali Democratic Movement in the inter-riverine regions populated predominantly by Reewin. Other groups fought to defend the territorial gains they had made since independence in the inter-riverine and coastal regions of the south. The Somali Patriotic Movement, representing the Ogaden clan, operated in the Middle and Lower Juba valleys; the Somali National Front, representing the Mahrehan, was based in the Gedo region; and the Somali National Alliance, a Habargedir faction, occupied the regions of Banadir, Lower Shabelle, Bokool, and Bay. None of these last three named clans had roots in the regions they claimed.[83]

Political alliances seemed to shift daily. Local warlords maintained their influence because they controlled large stocks of weapons that they used to acquire control over food and food sources. In areas they wished to bring under their sphere of influence, warlords employed their forces to cut off the food supply and to undermine the ability of people to produce their own food. Looting and extortion of food relief by warlords became a strategy to finance the extensive patronage system on which they relied for support. Two clans, the Cushitic Rahanweyn and non-Cushitic Bantu, who between them provided Somalia with much of the prewar food security it enjoyed, bore the brunt of the violence in the inter-riverine area. Todd Shields notes: "With each advance or retreat, marauding armies and their thousands of armed camp followers looted and pillaged without restraint. . . . Destruction was systematic, with wells, ponds, grain stores, seeds and livestock consumed, carried off, killed, or destroyed."[84]

General Mohammed Farah Aideed, the founder of the United Somali Congress, trained in the military academies of the superpowers as part of the search for allies and global stability during the Cold War. Like many others so trained, he used his education and access to make war on his own people. When Somalia began to fall apart in 1988, Aideed was serving as ambassador to India. Siyad had Aideed recalled when the insurrection began in 1988, but instead he fled and helped to set up the United Somali Congress and build an anti-Barre alliance with other clan-based movements. Aideed skillfully manipulated the clan system. Before the Americans arrived, he moved many of his heavy weapons to Galkayo, about 500 miles north of Mogadishu. Access to Galkayo, however, then came under the control of a militia of the SSDF. Aideed signed a cease-fire agreement with the SSDF militias and opened the road to Bosaso, which allowed him to bring heavy weapons back to Mogadishu and concentrate his fighters in Mogadishu and Kismayo. Aideed also built an alliance with Islamic fundamentalists that presented an alternative focus for Somali loyalty outside the clan system.[85]

In January 1992, the Security Council imposed an arms embargo on Somalia. The secretary-general, Boutros Boutros-Ghali organized talks between the parties, who agreed on a cease-fire, to be monitored by United Nations observers, and on the protection of humanitarian convoys by United Nations security personnel. The United Nations authorized a peacekeeping force, UNOSOM I (April 1992), to monitor the cease-fire in Mogadishu and escort deliveries of humanitarian supplies to distribution centers in the city.[86] The relief effort was hampered by continued fighting and insecurity that led the SC to approve the deployment of 3,000 additional troops to protect humanitarian aid in August 1992. Nonetheless, the situation continued to worsen as factions splintered into smaller factions. In December 1992, the UN authorized an additional task force, Unified Task Force (UNITAF), charged with carrying out United Nations Security Council Resolution 794 to create a protected environment for conducting humanitarian operations in the southern half of the country. Many of the militias perceived the presence of UNOSOM and UNITAF as a threat to their agendas. Consequently, battles erupted between local gunmen and peacekeepers. Aid workers were under constant threat of attack even though famine threatened. At this point, no effective functioning government or local security force existed.[87]

The UNITAF operation was conceived as a temporary force to secure a safe environment for aid operations. Once stability and safety had been restored, the suspended UNOSOM mission would be revived, but in a much stronger form. After the Black Hawk Down disaster that precipitated

American withdrawal, the Security Council established UNOSOM II (Resolution 814 [1993] of March 26, 1993) to replace UNITAF. The UN withdrew in March 1995, having incurred significant casualties but without having established a stable new central government.

As noted earlier, for the LONIAC to apply, the armed confrontation must exhibit two essential criteria. It must have *a minimum level of intensity*, and the parties involved in the conflict must show *a minimum of organization*. Somalia is not a party to the 1977 Additional Protocol II (PA-II, noninternational armed conflicts) nor to the Rome Statute of the International Criminal Court. Therefore, only that part of the conventions considered to articulate customary practice applies. Still, considering the reasoning of the *Tadić* Appeals Panel that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,"[88] then, given the circumstances, the only question with regard to Somalia becomes the nature of the groups involved. Nongovernmental groups involved in the conflict must be considered as "parties to the conflict," meaning that they possess *organized* armed forces. This means such forces have to be under a certain command structure and have the capacity to sustain military operations.[89] Many combatants in Somalia were irregular troops, militias, and armed "civilians," who did not belong to a group with a well-defined command structure.

Anthony Vinci provides an analysis of armed groups fighting in Somalia:

> With the collapse of the state, the clan or "faction" militias became the providers of security and, often, the political representatives of the clans. These faction militias have continued to constitute the bulk of the armed groups in Somalia. Some of the militia leaders, however, were able to gain independence from the clan, thereby using the militias to represent their personal interests: they became warlords. Since the mid-1990s, businessmen have also raised their own armed militias to defend their business interests. These militias have sometimes been outsourced to the shari'a courts that have formed throughout Somalia. Finally, at least one set of Islamist militia has been set up by al Ittihad.[90]

This suggests that the groups fulfilled the minimal requirements concerning command structure.

In Somalia, as in other conflicts of this ilk, distinguishing between combatants and noncombatants became almost impossible in many circumstances. Mark Bowden describes the chaotic scene in Mogadishu after the crash of the Black Hawk helicopter: "At every intersection now, Somalis just lined up on both sides of the street, and fired at every vehicle that came across . . . The city was shredding them block by block. No place was safe."[91] In terms of behavior, the phrase "reasonable in context" applies with special force here. As Solis has observed, being a soldier in combat does not entail signing a suicide pact.[92]

On the other side, the Somali forces almost totally disregarded any restraints. Among the grave breaches were widespread pillaging and looting of civilian property, interference with the delivery of humanitarian assistance, and in some instances direct attacks on humanitarian personnel; deliberately targeting civilian facilities, knowing that they housed civilians; and failing to take all feasible precautions to avoid civilian casualties by their choice of means and methods of warfare (using mortars and other indirect weapons without spotters).[93]

Taking all into consideration, particularly given that there were identifiable groups that could be held legally culpable for their actions, the conflict clearly met the standards where the LONIAC applied. That the UN did not constitute an ad hoc court to deal with the obvious massive violations that often involved its own peacekeeping forces testifies to the indifference about fundamental violations of the LONIAC, until the conflict in the former Yugoslavia.

A Short Note on Terrorism

Michael Howard has argued that when Secretary of State Colin Powell declared that the United States was "at war" with terrorism in the immediate aftermath of the September 11 attacks on the World Trade Center and the Pentagon, he committed a "terrible and irrevocable error."[94] To declare war on terrorists or terrorism accords terrorists a status and dignity that they do not deserve. More than that, however, to speak of a war in this context makes little sense beyond asserting that one will use every resource available to seek out and punish planners and perpetrators. Terrorist tactics occur in both IACs and NIACs as well as in peacetime. As many commentators have noted, the diffuse nature of terrorism reduces the idea of a "war on terrorism" to a metaphor, rather than a term of art.[95]

For the purposes of this analysis, it is worth emphasizing that terrorism as a legal concept does not constitute the status of an individual or a group but certain prohibited conduct. The trend in the practice of states and organizations is to define a number of organizations and groups as "terrorists." This approach is somewhat at odds with the way international humanitarian law and international criminal law regulate the phenomenon. Legally, terrorism defines a prohibited conduct or a crime, not a status. This might seem like semantic juggling, but despite the fact that terrorism impacts individuals in many different ways, the difference is important because being a terrorist does not make any difference in terms of IHL.

Note, however, if a state harbors terrorists—that is, if they are unwilling or unable to take action against individuals who plan, promote, and carry out terrorist attacks in other states—the target states may engage in "extraterritorial law enforcement" in response. For example, the legal questions about the raid that killed Osama bin Laden do not revolve around the raid itself but concern whether he attempted to surrender. In the context of the NIAC in Afghanistan, if bin Laden had made any indication that he would surrender, the raiding party would have had to take him as a prisoner of war.[96]

CHAPTER 6

War Crimes: Culture and Combat

> This struggle has nothing to do with soldierly chivalry or the regulations of the Geneva Conventions.
>
> —Field Marshal Wilhelm Keitel[1]

PERSPECTIVE

As noted in chapter 5, despite the opinion of Field Marshal Keitel, people must, and do, make judgments about ends and means in war. Chapters 3, 4, and 5 have discussed the interaction between the requirements of formal rules and the realities of application. This chapter explores the cultural roots that condition attitudes toward compliance or noncompliance. To this point, this book has focused primarily on questions of means—the proper conduct of war. Hence, *this section requires repeating an important introductory caveat.* As explained earlier in this book, much of what constitutes proper conduct is drawn from Western military experience. The material following, while again drawing primarily on Western experience and ideas, provides a framework for exploring and understanding other traditions, cultures, and perspectives.

David Grossman, in the introduction to his book *On Killing*, advances what he characterizes as a "novel and reassuring conclusion" about the nature of man, that "despite an unbroken tradition of violence and war, man is not by nature a killer."[2] Grossman, a retired army officer, reached this conclusion based on his own extensive investigations into the behavior of soldiers in battle as well as evidence from researchers pursuing similar lines of inquiry based on *Western* experiences in war. Grossman reflects: "The media's depiction of violence tries to tell us that men can easily throw off the moral inhibitions of a lifetime—and whatever other instinctive restraints exist—and kill casually and guiltlessly in combat. The men who have killed, and who will talk about it, tell a different tale."[3] The "natural soldier" is a rare breed.[4]

William Manchester wrote about his personal experience in World War II after the first time he killed a man in face-to-face combat—a Japanese sniper who was firing on Manchester's buddies from a fisherman's shack. His reflections on the experience some 20 years later give some substance to Grossman's contentions. Manchester records that during the episode he involuntarily urinated and defecated and then vomited shortly after.[5] Yet, countering Grossman, Manchester makes reference to a sign in the Paris Zoo: "Warning: this animal is vicious; when attacked, it defends itself."[6] After that experience, Manchester, as a U.S. Marine sergeant, seemingly had no more reservations about killing and managed to survive the subsequent island-hopping American operations in the Pacific theater of operations.

Tom Lewis, an officer in the Royal Australian Navy, also disputes some of Grossman's arguments (and evidence). Lewis cites among numerous others an American helicopter gunship pilot in Vietnam who said: "When I say that killing was easy, I don't mean to sound flip or trivialize the impact on the psyche of this most horrendous act. My biggest surprise about my war experience was that, under those conditions, it was not more difficult to overcome the civilized veneer. I never served with anyone who seemed to derive pleasure from killing another person, but I also saw little evidence that it was a huge moral issue for most."[7] Lewis concludes that the conditions of battle will quickly overcome any reservations for most: "Once front-line soldiers understand their job and get down to it, they are everyday dealers in life and death. Acceptance of the fact that 'it is him or me' marks their attitudes from that moment on. That is the true nature of their terrible but necessary occupation."[8] Where Lewis and Grossman do agree is that whatever has to be done to make successful soldiers must be done. Lewis states simply: "Successful soldiers in battle are killers, and they must be determined to kill."[9] But soldiers must also learn to discern legitimate targets from civilians.

Previous studies have claimed that a large proportion of infantry soldiers (as many as 65 to 75 percent) in World War II never fired their weapons at an enemy soldier.[10] Additionally, many of those who had killed, especially those who had done so in hand-to-hand encounters where the enemy's face was recognizable, often suffered severe psychological trauma. Grossman notes that the reluctance to fire has occurred even under circumstances where, if soldiers do not kill, they and perhaps their comrades will die. His simple conclusion—most individuals are reluctant to kill when the potential victim is an identifiable human being. In a similar vein, James Waller argues that, while ordinary people do participate in genocide and mass murder, most do not.[11]

Unless you have gone through army or marine corps basic training, few of us think about the importance of developing the necessary mind-set that will make ordinary men and women willing to kill. S. L. A. Marshal, whose work underpins much of the work on combat effectiveness, has argued that training for World War II did not prepare individuals to kill. In 1947, after analyzing his extensive interviews done during WWII, Marshal wrote: "We are reluctant to admit that essentially war is the business of killing."[12]

A number of analysts have attacked both Marshal's methodology and his findings.[13] Still, support for his general thesis comes from officers respected for their battle experience. General George Patton wrote that perhaps the great weakness of his troops was their reluctance to fire.[14] General Lucian Truscott, commander of the U.S. Third Division, observed:

> I was surprised to find what a relatively small proportion of individual weapons available in any unit were ever employed in action. One would think that every unit engaged in combat would employ every possible weapon, for battles are won by destroying or threatening to destroy the enemy. But this had not been so in the actions in which our infantry and armoured battalions had been engaged.[15]

Despite some evidence that more soldiers fired their weapons in Vietnam, Anthony King, in his recent study, argues that "in the Second World War as in Vietnam, poorly trained infantry were disoriented by combat . . . so that they were unable to execute their roles effectively."[16] King also notes that these observations applied as well to soldiers in other *conscript* armies.[17] I emphasize the word "conscript" here because the move to different training methods, and to smaller, standing professional armies, has improved battlefield performance of regulars but at the cost of an increase in psychological casualties.

But Grossman's research into, and his arguments about, the nature of "killing" are considerably more nuanced than these quotes suggest. On the basis of the findings about infantrymen in World War II, Korea, and Vietnam, the military did change its training methods, and for reasons discussed below, the composition of platoons. Stephen Ambrose quotes two World War II veterans: "The noise, the shock, the sensation of total helplessness and bewilderment, the loss of control, the sudden loss of every familiar assumption—nothing in civilian life or training offered an experience remotely comparable."[18] Ambrose concludes that combat could only be experienced, not played at. It was "critical to getting the men into physical condition, to obey orders, to use their weapons, to work effectively with hand signals and radios and more. It would not teach men how to lie helpless under a shower of shrapnel in a field crisscrossed by machine-gun fire. They just had to do it, and in doing it they joined a unique group of men who have experienced what the rest of us cannot imagine."[19]

Equally important, the nature of most Western armies changed as well. The question then becomes, what changed and to what effect? Perhaps most importantly, the army changed from conscript to professional/volunteer—from a mass-based universal-service concept to a self-selected group of professional soldiers. Grossman also states that since World War II, a new era has quietly dawned in modern warfare: "Psychological warfare conducted not upon the enemy, but upon one's own troops . . . With the *proper conditioning and the proper circumstances, it appears that almost anyone can and will kill.*"[20] He does note that the change with respect to the military has not come without consequences. The numbers of soldiers suffering from post-traumatic stress have risen dramatically. If soldiers now are more willing to kill the enemy, the change comes with a price—they still do not kill without guilt.[21]

Table 6.1 lists a number of factors that can, in specific circumstances, override individual inhibitions about killing or inflicting harm. The factors obviously have considerable overlap in terms of explanation. No single influence can account for all behaviors.

Table 6.I

What Motivates Soldiers to Kill

- Psychological Conditioning
  - dehumanization of targets
  - respect for authority
  - conditioned responses to situations
  - focus on task–machine gunners and "crew operated" weapons

- Leadership/Authority
  - proximity
  - subjective respect for leader
  - intensity of demand(s)
  - legitimacy

- The Group: Accountability to Fellows
  - bonding
  - "mutual surveillance" phenomena

- Physical and Emotional Distance from "Targets"
  - bomber pilots and crew
  - missile launch officers
  - artillery crews

Source: drawn from Grossman, *On Killing, passim*.

These factors, though derived from battlefield observations, also provide a basis for exploring the social-psychological and psychological influences that can turn ordinary people, willing or not, into perpetrators and accomplices in war crimes. In particular, the discussions of particular situations will draw on psychological factors that may inhibit rational response under pressure. These factors will form the structure for the discussion of particular events and situations.

PERSONALITY, HUMAN NATURE, SOCIALIZATION, AND BEHAVIOR

The first part of this narrative will address very general concepts about how individuals acquire the beliefs that guide them through life. Keep in mind that Marshal argued that *part* of the explanation for the reluctance of infantrymen to fire stemmed from their socialization into the fundamental morality of Western culture, which places great value on human life.[22] Even so, Western societies do not have an exemplary record in terms of benign treatment of those considered less "civilized." Primarily, the following explores two basic but interrelated categories that affect individual behavior. The two categories involve factors that affect individuals in very different ways. The first category entails factors that generate the fundamental values and attitudes that shape how individuals perceive and deal with "their" world—the process of *socialization*. The second category involves factors that influence individual decisions in specific circumstances. The second category includes factors and techniques that may erode or override individual inhibitions against harming and killing people. As with most classifications of behavior, the categories have some overlap. Table 6.1 lists factors that fall primarily into the second category, but the first two items under Psychological Conditioning—dehumanization of targets and respect for authority—are elements that will be included in both discussions. Moreover, the values and attitudes instilled through the socialization process will determine how susceptible individuals are to influences in the second category.

Nature versus Nurture

To complete the picture, some would argue that a third factor, individual personality traits, also play a role. Philosophers, social scientists, and others have long debated the issue of whether humans are aggressive by nature and have innate tendencies that promote self-gratification and survival over other values, or whether the circumstances of the social environment have the most important influence in forming how we interact with the world. Are certain psychological characteristics, such as behavioral tendencies, personality attributes, and mental abilities "wired in" by genetic inheritance or is the mind at birth a blank slate that evolves as children interact and experience the environment around them? Why do some people seek and accept risk, and why do others buy insurance and seek safe positions? What accounts for "natural" soldiers? How do we explain the "black sheep" of the family? Popularly, the questions relating to the relative influence of genetic makeup as opposed to environmental factors has become known as the "nature versus nurture" debate.[23]

Sigmund Freud, for example, believed human beings have an innate aggressive/destructive drive (*thanatos*) that "functions in every living being, striving to work its ruin and reduce life to its primal state of inert matter."[24] Civilization is possible only when reason and circumstance result "in the progressive rejection of instinctive ends and a scaling down of instinctive reactions."[25] From the opposite perspective, Albert Bandura argues that environment comprises the most important factor.[26] Children learn by observing and imitating the behavior of people in the world around them. They learn "appropriate" behaviors by observing the responses to the actions of others, as well as through feedback in the form of reinforcement or punishment for their own actions. They also learn how to justify their actions. Considering this, one should immediately comprehend the importance of controlling the use of *child soldiers*.

The purpose of this book does not demand an exploration of the issues raised by this debate in any detail because the impact of individual psychological makeup, except for leadership, has less importance than other social-psychological and situational factors. "Lone wolf" or "berserker" killings happen in the most peaceful communities.[27] No reputable writer argues that human nature is entirely to blame for any of the horrendous events that have occurred over time, but people often seek simple answers. Note that even Freud, who believed that human beings had a fundamental aggressive drive, offered a nuanced answer to Einstein in arguing that reason and circumstance could control the basic urges. For our purposes, these traits play a role as a mediating factor in determining the extent to which individuals absorb and act on the standards and beliefs inculcated through socialization, but they do not offer a complete explanation. Ervin Staub summarizes:

> Our knowledge of personality dispositions and their childhood origins is not specific enough to identify the sources of different types of aggressive behavior . . . Circumstances may join with common rudimentary dispositions to shape specific types of hostility and aggression.[28]

The following narrative will explore the role of culture, group psychology, and other environmental factors and how these interact as preconditions along with situational factors that can trigger or condition specific events.

Socialization and Culture

Individual world views result from a process of *socialization* that shapes the way in which individuals interact with their world. Socialization results from a blend of cultural and institutional factors that include family, peer groups, religious beliefs, ethnicity, school curricula, class, and nationality. Obviously these do not represent self-contained categories. Ethnicity and family (or lack thereof) will influence factors such as peer group associations and religious beliefs during an individual's formative years. The relative importance of these factors will vary by culture. For example, while peer groups have great importance in the United States, in other parts of the world they have considerably less influence than adult family members or other adult authority figures.

Culture proves shared explanations and images of the world. *Culture will shape essential attitudes toward the legitimate use of violence*, accepted behaviors toward group members, perceptions of persons not members of the core group, and appropriate behaviors when dealing with "foreigners."[29] Note that ethnicity, religion, race, and nation are all social constructs that depend on how each distinctive community defines them. In this sense, the process of socialization determines each. Cultures differ in their orientation toward the welfare of others.

Socialization of the young creates individuals whose personal values and conduct will permit them to function effectively in their immediate social environment. How congruent those values are with expectations in a broader social context, such as a dominant national culture, can determine one's status within the broader society and one's attitude toward "foreigners" or other social groups. Different cultures can either mitigate or exacerbate negative attitudes toward those considered outsiders. The general belief that African Americans were of a lower order, at best second-class human beings, had great currency across the United States during the era of segregation (and not just in the southern states). Although more publicized when they happened in the southern states, acts of overt violence against African Americans more often than not were simply ignored and glossed over. This provides an instructive lesson. Cultural norms can predispose members toward mistreatment.

Staub argues: "The moral orientation of a society sets limits on acceptable conduct and influences the choice of avenues to cope with difficult life conditions."[30] Devaluation (desensitization), a denial of equal humanity, makes mistreatment more likely. Just defining people as "them"—that is, not part of "us"—devalues their standing and worth. Staub asserts that otherwise unacceptable acts become acceptable when directed at "them" because by definition "they" do not have a place in the moral universe that defines "us."[31] The parallels in rhetoric and justifications used by all sides in a modern war might be simply characterized as the "Pure Self" versus the "Demonic Other." We do what we do for good cause or through honest mistakes. Actions of the Demonic Other always flow from far baser motives. Because our motives are pure and just, we can do no wrong. The Demonic Other, by opposing our efforts, can do no right. As a factor that operates to desensitize killing, racial epithets that emphasize preexisting prejudices loosen inhibitions and help make the Demonic Other into something that has little right to earthly existence.

Paul Fussell paints a graphic picture of how American and British soldiers in World War II characterized their opponents:

> For the war to be prosecuted at all, the enemy of course had to be severely dehumanized and demeaned, and in different ways depending on different presumed national characteristics. One was of classifying the Axis enemy was to arrange it by nationalities along a scale running from courage down to cowardice. The Japanese were at the brave end, the Italians at the pusillanimous, and the Germans were in the middle. . . . Americans detested the Japanese the most, for only they had had the effrontery to attack the United States directly . . . They must be animals to behave thus, and cruel ones at that. "Bestial apes"—that is what Admiral William F. Halsey termed them.[32]

He adds that an axiom of military propaganda holds that monosyllabic enemies are easier to despise than others: "A *kraut* or *wop* is instantly disposable in a way a German or Italian isn't quite, just as in the Great War, a *boche* or a *hun* betrayed by their very names their vileness and worthlessness."[33]

The Relevance of Situational Factors

If a close bond exists between members with a shared goal, groups can enable killing and atrocity. From another perspective, peer pressure, in which the individual cares about what others think about him or her, can push people to commit acts that they would not otherwise do. Grossman states that the influence of groups "occurs through a strange and powerful interaction of accountability and anonymity."[34] The shared sense of purpose and accountability to the group reduces the sense of individual responsibility (diffusion/transfer of responsibility, repression of conscience—group values and goals override others). Military training seeks to build such a bond. Individuals slay together, play together, and pray together. Social psychologists term this phenomenon "mutual surveillance." Group participation diffuses responsibility for group action because of shared participation. Internal rules, formal or informal, govern expected behavior. Members feel accountable to their fellows but not necessarily for what the group does. Anxiety about the response of others if you do not do well plays a part as well. A participant in the Rwanda genocide said: "If you proved too green with the machete, you could find yourself deprived of rewards, to nudge you in the right direction. If you got laughed at one day, you did not take long to shape up."[35]

The closer the bond between members, the more powerful the internal group ethos will be on individual behavior. Military basic training seeks to instill that bond between new recruits. It can be a double-edged sword. *In the heat of combat, fear, anger, hatred, retribution/revenge, and perceptions of tactical "necessity" can produce horrific as well as heroic incidents.* At the trial of three soldiers of the First Cavalry Division for killing a Vietnamese detainee (1967), a defense counsel argued: "He has seen his friends killed and wounded. He has had a close friend shot twice in the back . . . Killing and people being killed is an everyday fact of life . . . He has seen VC atrocities. Gentlemen, this affects a man, nobody can deny that. His platoon was nearly wiped out and a lot of his friends were killed or wounded."[36] A sergeant testified: "Circumstances like this are the kind of sort that get a man a little bit blood thirsty out there. I've been the same way. I've been to the point where I'd kill a woman or child if I had a chance after seeing some of my best buddies die."[37]

JAPAN

In terms of relations with the West, Japanese history contains two great ironies. The first stemmed from the decision to isolate the island from foreign influences after unification of the island early in the 17th century. The second irony came with Japanese emergence from isolation. Modernized Japan continued its love-hate relationship with the West exhibited in its earlier history and decision for isolation. Clearly, its emergence from feudalism and successful drive to become a full member of the state system owed much to the willingness to learn, adopt, and adapt, much from the West. However, Dower observes that the Japanese decision to undertake modernization occurred at the very point when scientific racism had come into vogue in Europe and the United States. The attitudes, considered empirically verifiable, that branded them as inferior literally "colored" diplomatic relationships. Rather than embracing the resurgent Japan, both Europe and the United States passed discriminatory immigration policies, and Western states openly opposed requests in the League of Nations for a simple declaration of "racial equality."[38] Hence, to some immeasurable degree, humiliations flowing from the continual refusal of the West to acknowledge Japan as an equal fueled Japanese anger. After the Washington Naval Conference of 1922, a Japanese delegate characterized the agreement for the famous 5:5:3 ratio for capital ships (United States:Britain:Japan) as "Rolls-Royce, Rolls-Royce, Ford."[39]

The racism of the West clearly embittered the Japanese, but on the other side, given their obvious success in terms of becoming a modernized industrial power, they considered themselves far superior to other races and cultures in Asia. They spent a great deal of time in justifying their position because of their unique and superior qualities.[40] One lesson well learned from the control of colonial empires by the Western powers was that strong nations had the right, perhaps couched in the language of obligation (i.e., become a "tutor"), to conquer weaker ones. The complete relegation of other Asians to a position of subservience to Japanese needs and desires did not arise from the pressures of wartime demands. Permanent domination formed a central part of official rhetoric justifying the Co-Prosperity Sphere based on the idea that to survive and prosper in competition with its enemies, the *Yamato* race needed "living space" (e.g., *Lebensraum*) beyond the highly overcrowded islands because of a perception that increases in population would soon exhaust the available resource base.[41] The hardships of the 1930s caused by the worldwide Great Depression combined with a surge in population growth reinforced the idea that territorial expansion formed an absolute necessity.

Isolation and Reinvention

Unification of the island had occurred under the rule of the Tokugawa clan. The beginning of the Tokugawa Shogunate, which would last until the restoration of the emperor to effective political authority in 1867–1868, began with the appointment of Tokugawa Ieyasu in 1603.[42] A decision for isolation came after the Shimbara Rebellion (1637–1638), which occurred in response to the increasing persecution of Christians, corruption in local government, and poor economic conditions. Suppressing the rebellion produced a bloodbath in which "only a handful" of rebels survived. Legislation expelled all Portuguese missionaries and traders, imposed the death penalty on all Japanese who attempted travel abroad (or return from abroad), and forbade the building of any ship or boat that had the capability of doing more than navigate coastal waters. The only Europeans permitted a presence were the Dutch, who in return for their aid in quelling the uprising were granted a small trading enclave housed on an artificial island in Nagasaki Bay.[43] Japan also discontinued its own overseas trade ventures in Southeast Asia.

The seclusion policy reflected both strategic and ideological rationales. Not unreasonably, Japan's rulers saw foreign powers as posing a potential military threat to Japan; and they feared, not unreasonably, that devotion to Christianity, and its Lord, would undermine absolute loyalty to the feudal lords who ruled the land. Morton and Olenik conclude:

> By this decision for retreat and isolation Japan gained stability and internal solidarity at a time when these factors were urgently needed in its society. But . . . this closing down and sealing off took place just when the rest of the world was being opened up to an interchange of goods and ideas incomparably more thorough and

> extensive than had ever been known before. The rate of social and technological change in the West became rapid in the two centuries following 1640, whereas in Japan the rate of change was deliberately slowed down by Tokugawa policy.[44]

Peace and prosperity came at the price of institutions that resembled a modern police state. On the brighter side, Morton and Olenik argue that when Japan did reopen foreign relations with the West, isolation had fostered conditions that provided a strong foundation on which they could rapidly respond to the challenges posed by modernization.[45]

Modern Japanese history begins in 1853 when Commodore Matthew C. Perry of the United States Navy steamed into Edo (modern Tokyo) Bay with a small squadron of U.S. Navy ships. The Perry mission was not the first American attempt to establish ongoing contact with the Japanese. In the 1830s, the Far Eastern squadron of the U.S. Navy had sent several unsuccessful missions from its regional base in Guangzhou (Canton), China, but in each case, the Japanese had not permitted them to land. Because they lacked express authority and instructions from the U.S. government, these earlier expeditions had decided not to force the issue. True to their isolationist policy, the Japanese demanded that Perry leave and sail to Nagasaki. Based on earlier experiences and the continued ill-treatment of shipwrecked American and foreign sailors, Perry firmly believed that the only way to convince the Japanese to accept Western trade was to display a willingness to use its advanced firepower. A display of force combined with the then-advanced technology of the steam-powered ships, impressed the Japanese and convinced them to accept demands made by Perry. The Japanese grudgingly agreed to Perry's demands, and the two sides signed the Treaty of Kanagawa on March 31, 1854, which opened the Japanese ports of Shimoda (a city between Kyoto and Edo/Tokyo) and Hakodate (on the northern island of Hokkaido) to U.S. trade. The United States dictated the terms. The Japanese had little choice but to agree because they understood they had no effective counter to American military technology.[46]

In 1868, the Japanese emperor Meiji regained control of effective governing authority in Japan. With the Meiji Restoration, the new government endeavored to assimilate Western ideas, technological advances, and customs. The driving impetus behind Japanese modernization stemmed from a strongly held conviction among elites that Japan must avoid becoming another dependent state like China. The Japanese knew that the American ships signaled the beginning of Western interest in their islands. Russia, Britain, France, and Holland all followed Perry's example and used their fleets to force Japan to sign treaties that promised regular relations and trade. The powers did not just threaten Japan—they actively used their navies on several occasions to defeat and disarm the Japanese feudal domains that defied them. By the end of the 19th century, Japan had transformed itself into a modernized industrial state.

Changes in Japanese Politics

Between the Meiji Restoration and its participation in World War I, the Empire of Japan fought in two significant wars. The first, in 1894–1895, revolved around the issue of control and influence over Korea. Beginning in the 1880s, China and Japan had begun a vigorous competition for influence in Korea. In 1895, responding to factional fighting in his court, the king of Korea sought help from China. The Chinese sent a small expeditionary force. The Japanese, at the behest of their patrons in the "progressive faction," sent a large army along with a demand for reform in the Korean administration. When the Chinese refused, war ensued. Hostilities proved brief, with Japanese ground troops routing Chinese forces and nearly completely destroying the Chinese navy in the Battle of the Yalu River. Japan and China signed the Treaty of Shimonoseki, which ceded the Liaodong Peninsula (southeastern Manchuria) and the island of Taiwan to Japan along with an indemnity of 30 million pounds. After the peace treaty, Russia, Germany, and France forced Japan to withdraw from the Liaodong Peninsula.[47] The leaders of Japan did not feel that they possessed the strength to resist the combined might of Russia, Germany, and France, and so gave in to the ultimatum. At the same time, the Japanese did not abandon their attempts to bring Korea into the Japanese sphere of influence, finally formally annexing it in 1910.

In 1904–1905, Japan went to war with Russia over Russian expansion into Manchuria, another area long coveted by Japan. A stalemate developed on land, but the Japanese destroyed or disabled 32 of 35 Russian ships in a major naval battle in the Tsushima Straits (between Korea and Japan) in May 1905. The peace treaty (brokered by President Theodore Roosevelt at Portsmouth, New Hampshire) recognized Japanese interests in Korea and ceded the southern half of Sakhalin Island and the Russian lease on the Liaodong Peninsula to Japan. Much to the dismay of the Japanese, they received no indemnity. This caused great discontent within Japan because of a perception that Japanese leaders had bowed to Western demands once again.[48]

The Culture of War and War Fighting

In his study of Japanese war crimes during World War II, Yuki Tanaka argues that the key to understanding Japanese behavior in WWII begins with charting the changes in Japanese moral concepts and ideology and the reconstruction and perversion of the older *bushidō* military code in the period immediately preceding World War I. Tanaka maintains that the key to understanding lies in the fact that Japanese culture lacked any elements that supported the ideas associated with the Western concept of individual rights. Responsibility was defined as duty owed to one's superior, beginning with the family: family to father, father to state, state to emperor:

> The clearest example of . . . abrogation of individual responsibility for one's actions is undoubtedly the conduct of Japanese soldiers and officers . . . in their treatment of POWs. The military doctrine of unquestioning obedience to superior officers was heightened by the fact that such orders were explicitly given "in the name of the emperor"; the chain of duty was thus made explicit at each stage, and the responsibility for acts was transferred up the chain to the emperor. Consequently, the Japanese soldiers who were defendants in the war crimes trials denied responsibility for their acts—and did so in good faith: They honestly believed that responsibility rested . . . ultimately [with] their highest allegiance, the emperor.[49]

Tanaka asserts that the absence of any idea of personal responsibility for political acts had an "enduring impact" on how Japan has continued to interpret the Asia-Pacific war.[50]

Tanaka identifies what he describes as the seven "essential" elements of the traditional *bushidō* code: commitment to justice and duty; courage to do the right thing in the face of adversity; humanity in the sense of tolerance and sympathy for others; propriety or the realization that humanity lies in acts of kindness; sincerity; honor as the practice and realization of one's own duty and privilege; and loyalty. If followed, the traditional code would have made the atrocities committed during the war unacceptable—the honorable warrior could do no harm without feeling great shame.[51] World War II Japanese army veterans would emphasize that their greatest fear came from the possibility of committing an indiscretion that might bring shame on their family. Yet, the ideas of what acts bring shame had changed markedly with the adoption of the new code.[52] The traditional code did demand that high-ranking officers commit ritual suicide (*seppuku*) for serious offenses but specified only minor forms of punishment (keyed to the seriousness of the violation) for ordinary soldiers. Tanaka asserts that "this forms a stark contrast with the conduct of officers during the Asia-Pacific War, when the court-martials were used to punish the rank and file harshly for disobeying orders, no matter how absurd, and to cover up the wrongdoings of officers."[53]

Over time, the concepts of loyalty and duty had become defined as blind obedience to orders and dying for the emperor. "Blind obedience to the emperor was the glue that held this ever-expanding army together."[54] In the period between the Russo-Japanese War (1904–1905) and World War I, the Japanese military drastically changed its existing military training and strategic concepts to mirror French and German ideas. The most prominent changes resulted in emphasizing "fighting spirit" and the will to achieve victory at any cost.[55] The Japanese Field Service Code now required soldiers to commit suicide rather than surrender. Tanaka attributes this to a generational change that occurred due to retirements, resulting in a top echelon leadership with very different class origins, education, and experience from those who had guided policy over the past 50 years. The new breed had learned the words of the code but had not been schooled to understand the true meaning of the concepts.

Tanaka argues that the potential for brutality and "blind obedience" came from the harsh treatment and indoctrination the military imposed on its own officers and soldiers in the guise of the reconstructed code. Lawrence Rees confirms this by emphasizing that "every single veteran we interviewed recalled an army training of the utmost brutality, . . . planned and systematic, part of a carefully thought-out method by which the High Command attempted to mould the type of soldier they desired."[56] Presumably the training had the objective of instilling the idea that on the battlefield, success comes from acting as a group. The High Command had signed off on the methods because as the army expanded, new recruits increasingly came from lower classes that needed much training in discipline and "education" about the demands and commitments that service to the emperor would require.

All equipment and orders were issued in the name of the emperor. Dying in service to the emperor became a soldier's most honorable duty. The treatment of POWs in WWII reflected the contempt Japanese soldiers felt for those who had surrendered because they had no honor. They had shamed themselves and their families because they had surrendered rather than electing to fight to the death.

Military Influence in Domestic Politics

To many in the Japanese Imperial Army as well as other ultra-nationalists, the changes in social fashion and mores (for example, women were working and being more assertive) generated fear that the decadence of a new generation was slowly eroding important traditional values. The army represented themselves as the guardians of the ancient virtues enshrined in the *bushidō* code. The domestic fallout from the Great Depression that began in 1929 provided the army with the opportunity to gain a dominant influence over policy. Their answer to economic recovery revolved around a Japanese version of "manifest destiny" with respect to the Asian continent. Expansion would obtain access to resources and land for resettlement.

In 1931, the Japanese army in Manchuria created a bombing incident near Mukden (Shenyang) on the South Manchurian Railroad. The Japanese plan sought to attract Chinese troops and then blame them for having caused the disturbance in order to provide a pretext for a broad military response as a legitimate measure to protect the railway. The plan proceeded in spite of opposition from the Tokyo General Staff. Once under way, the operation had a momentum of its own, resulting in total Japanese control of Manchuria by early 1932. The principle value of Manchuria came from its strategic importance and natural resources (coal and iron ore), not as land for resettlement. The Japanese set up a puppet state of Manchukuo, ostensibly governed by Chinese but totally controlled by the Japanese military. Appeals to the League of Nations by China resulted in a condemnation of Japan that had little impact because the organization did not apply sanctions. In response to the league's censure, Japan rescinded its membership.[57] The experience deepened Japan's bitterness and suspicion of the West.

Domestic politics in Japan became more confrontational and violent. Extremists stressed their pure motives, sincerity, and patriotism to justify their tactics, which included attacks on, and assassination of, those whose views made them impure, insincere, and unpatriotic. In February 1936, dissatisfied with the increasing stalemate in civil government, a group of extremist junior officers attempted a coup in Tokyo. The leadership adopted the name "Righteous Army." They assassinated a number of cabinet ministers and members of the Imperial Household Ministry. When Minister of War Yoshiyuki Kawashima presented the demands of the rebels to the emperor, he rejected all of them, demanding that Kawashima suppress the uprising. The coup attempt failed, but the incident had the effect of significantly increasing military influence over the civilian government.[58]

With Manchuria and its dominant role in domestic politics now secured, the Imperial Army now sought to dismember China proper by occupying the five northern provinces as the next step in extending the Co-Prosperity Sphere. Over time, Japan had slowly increased its economic penetration and presence in the area. The Nationalist government of Chiang Kai-Shek, facing its own challenges from the strains associated with modernization to the challenges from local war lords and the Communist movement led by Mao Zedong, had little capacity to counter these encroachments.[59] The war with China began with a minor skirmish that escalated into a major test of wills. The strength and nature of Chinese resistance resulted in a war that the Japanese found they seemingly could not win and could not afford to end. Yet the war solidified army dominance in the domestic arena.

Japan and China

While the main focus here will be on the Pacific theater in World War II, one should not forget that the Chinese were the first victims. An exploration of the Japanese attitude toward and treatment of the Chinese forms a necessary backdrop to the discussion of the later interactions between Japanese and American soldiers. Racial myopia made the Japanese military overly confident about the ease with which they could subjugate the Chinese. Japanese military leaders believed that a Japanese regiment (1,800 men) could attack and destroy one Nationalist Chinese division

(12,000 men) and that a Japanese battalion (600 men) could successfully oppose one Chinese division of local warlords.[60] Even though the magnitude and scope of atrocities has been contested by various ethnic, political, and national parties (as well as by professional historians), the nature and extent of Japanese crimes in China and across Asia just prior to, and during, World War II has been well documented. The proceedings of the International Military Tribunal for the Far East (IMTFE) includes an extensive compilation and discussion of particular occurrences.[61] The record indicates that Japanese soldiers acted with a constant ruthless brutality toward the enemy, whether civilians or soldiers. Rape, coldhearted torture, execution, random murders, inhumane treatment of prisoners, and deliberate mutilation of corpses formed a broad pattern of consistent behavior, not a series of isolated incidents.

Wholesale massacres of civilians began with the invasion of northern China early in 1937 and continued through the end of World War II in 1945. No one will ever know the exact number of victims nor how many Japanese soldiers actually participated in the atrocities. At the end of the war, the horror escalated as troops continued their depredations by extending the slaughter to their own countrymen and kin. By 1941–1942, their quest to "pacify" northern China involved indiscriminate terror against the peasantry. Through either flight or death, the "three-all policy" (*sankō seisaku*), "kill all, burn all, destroy all," reduced the population by an estimated 19–20 *million* individuals.[62] One Japanese soldier said, "Basically it was all connected to the emperor system. We were brought up to kill communists and in this province everybody was communist so these people should be killed for the emperor. That was the thinking of the ordinary soldiers."[63] Another soldier, when asked if he felt any sense of guilt for crimes he'd committed, said that he did not "because I was fighting for the emperor. He was a god. In the name of the emperor we could do whatever we wanted against the Chinese. Therefore I had no sense of guilt."[64]

The Shanghai Incident (1932)

In the history of Sino-Japanese relations, the Shanghai Incident (January–March 1932) often receives treatment as a minor footnote. Histories of Japanese involvement refer to action as the First Shanghai Incident, which points to the Second Shanghai Incident, the Japanese name for the battle that occurred during the opening stages of the Second Sino-Japanese War in 1937. Nonetheless, a number of events in this brief conflict presage much that occurred later. The attack began with the Japanese using carrier-based aircraft to bomb the city in an attack that had no military objective other than producing terror among the civilian population, an action that would become commonplace in wars to come. The behavior of the Japanese army during the 33-day intervention in Shanghai presaged later episodes of mass brutality and barbarism against civilians where commanders either had lost effective control or had encouraged, or deliberately chosen to ignore, such rampages. The bombing, strafing, and naval shelling had reduced large parts of the peasant quarter, Zhabei, to absolute ruin. With an estimated 4,000 Chinese deaths, this became the deadliest conflict in Asia since the Boxer Rebellion in China (1900).[65]

Comfort Women and Rape

Comfort women (*ianfu*) were women and girls forced to serve as prostitutes by the Imperial Japanese Army in occupied territories before and during World War II. Tanaka states that the policy flowed from two sources, racial prejudice and the general contempt for women in Japanese society.[66] Perhaps because they feared a backlash of opinion from the large European community in Shanghai, the Japanese military became concerned over the number of Chinese women raped during the 1932 "Shanghai Incident." Interestingly, Tanaka argues that the concern came from a fear of creating antagonism among Chinese civilians, a contention that seemingly contradicts their actions in other contexts. He also asserts that military leaders saw providing comfort women as giving "leisure time" because, unlike Western militaries, the Japanese armed forces did not have either designated leave periods or limited tours of duty.[67] In addition, the leaders had two other pragmatic reasons: to control the incidence of venereal disease and to ensure security. They felt private brothels could too easily be infiltrated by spies, or alternatively that the women working in them could easily be recruited as spies. The *Kempetai* (military police) frequently visited the comfort houses to ensure that no spies were among the women.[68]

At first, the military intended to recruit volunteers from Japanese women, but this method not only did not yield the numbers needed, the military really believed the primary role of Japanese women was to bear good Japanese children who would serve the emperor.[69] Tanaka notes that racial prejudice played a role here because young women from other cultures were treated as "military supplies" to be used as necessary. Although women were taken from all of the "colonies," 80 percent came from Korea. Soldiers had no respect for the *ianfu*, characterizing them as "public toilets."[70] Physical abuse was a part of their daily life. The women, who received no wages, often "took care of" 70 men in a work day that lasted from seven in the morning until midnight. Because the military deliberately destroyed relevant documents at the end of the war, no one really knows the exact number of women who were exploited, but using existing sources Tanaka estimates that the total may have reached 100,000.[71]

Still, providing comfort women did not end the crime of rape. Rees asserts that the crime of rape had become institutionalized and a "kind of bonding exercise between comrades, a reward to be offered to junior soldiers once they had proved their worth."[72] Rape did constitute a crime according to Japanese military law, but very few of those who committed the crime were ever held accountable because either the victims were dead or senior officers simply condoned the practice.

Prelude to Shanghai 1937

When the Japanese invaded China in early 1937, soldiers received "additional training" to inculcate the idea that the enemy they faced consisted of a subhuman species. The Chinese were characterized as *chancorro*, implying that they did not belong to the human race but were a subhuman species of bug or animal. Chinese and Koreans were considered no more than waste or garbage. Training in bayonet techniques used live Chinese men. Dower observes that the bayonet became the ordinary soldier's counterpart to the samurai sword carried by officers.[73] One veteran observed: "When I first understood that we were killing them, stabbing live human beings, I was shaking . . . At the order I ran and I stabbed and the bayonet went into the body very easily. I learnt that it was easy to bayonet a human being . . . Once I did it, it became easy. I didn't think anything about the man I killed."[74] Another touched on the mutual surveillance theme of group ethos pressure: "I didn't have the courage at the beginning, but I couldn't escape from it. I would be labelled as 'chicken.' So I had to do it . . . The first time you still have a conscience and feel bad. But if you are labelled as courageous, and honoured, and given merit . . . that will be the driving power for the second time. If I'd thought of them as human beings I couldn't have done it. But because I thought of them as animals or below human beings, we did it."[75] The Imperial Army also used live Chinese for target practice to convince soldiers that killing Chinese was not only acceptable but an expected duty. Surgeons used healthy live Chinese for training exercises that included amputations and other vivisection procedures, sometimes without anesthetic, as a means of reproducing field conditions.[76]

In July 1937, in preparation for a campaign to take Beijing, the Japanese moved the majority of their occupation troops to take part in the battle. Tonzhou had been designated as the seat of the "East Hebei Autonomous Government." The Japanese had set up a puppet government using Chinese administrators and an indigenous auxiliary policy force. The locals, including many in the local police, resented the foreign presence. The withdrawal of the Japanese force provided an opportunity for vengeance. Peter Hamsen writes that "what followed was not so much a battle as a massacre. Years of pent up anger was released in an orgy of blood."[77] Many Japanese civilians were tortured and mutilated before being killed. The Chinese raped the younger women before killing them, cut off the arms of the old women, and decapitated others. Japanese troops quickly returned and exacted a terrible revenge, beheading every Chinese man they could find and raping the women. As a final act, they set the town on fire. While the numbers pale in comparison with later actions as Japanese troops marched down the coast toward Shanghai, the horrific acts in retaliation served a graphic notice of events to come.[78]

Shanghai 1937

Although second in total population to Tokyo, Shanghai was by far the most cosmopolitan city in Asia. The port facilities at the mouth of the Yangtze River made it the preferred place for setting up consulates and offices for foreign trading companies. An estimated 70,000 foreign personnel lived in the city. The comfortable lifestyle of the foreign quarter masked the reality of everyday life in other parts of the city. The Chinese peasants who had built the city lived in a bleak and brutal poverty. Outside the foreign quarter, rival gangs and local warlords vied for control of the city's prostitution, gambling, and extortion operations as well as the lucrative opium trade. The Chinese writer Han Suyin remarked that the organized crime in Shanghai made "the Chicago of Al Capone appear a staid almost pious provincial town."[79]

On August 10, 1937, a manufactured incident that killed two Japanese sailors, this time instigated by the Chinese, raised the level of tension. Ignoring their orders from Chiang Kai-shek to establish a base of operations just outside the city, several high-ranking officers in the Nationalist army, remembering 1932, moved several of their best-prepared fighting units into Zhabei on August 12, causing a mass exodus in anticipation of the violence to come. Fighting began on Friday the 13th. Once started, it quickly became apparent that nothing would prevent a major escalation in violence.

The struggle lasted until early November, when the Chinese finally had to withdraw. The descriptions of the destruction reflected how savage the fighting had been. A French journalist wrote upon returning: "In the surrounding countryside, even the smallest farm building had been shelled and consumed by fire. The trees had been blown to shreds. For mile after mile the scene along the riverbank was one of ruins and scorched earth, dotted with the charred skeletons of trees and signposts."[80] The city outside the international quarter had fallen into the hands of predatory mafia-style gangs, so that murder and rape continued as virtually an everyday occurrence. Very few historical sieges and battles had produced the level of destruction wreaked upon Zhabei. Estimates place the Chinese dead at between 250,000 and 300,000 against an estimate of Japanese dead of 9,000-plus.

Nanjing

In December 1937, the Japanese General Staff approved an attack on Nanjing (translated as "southern capital"), the city that had served as the designated capital since 1927. On the lower Yangtze River, access to the sea had made it one of the largest inland ports in the world. On the march upriver, to reduce Chinese ambush sites, Japanese soldiers torched homes and buildings along their route. Hamsen writes: "They turned into a deserted and blackened wasteland where the only living creatures were stray dogs 'unnaturally fattened by feasting on human corpses . . . ' The soldiers routinely massacred the civilians they encountered, sometimes as a form of entertainment."[81]

The Japanese reached the city's second line of defense on December 10 and unexpectedly encountered stiff resistance, taking heavy casualties. After the Japanese succeeded in breaching the walls, the Chinese commander ordered a general retreat on December 13. General Heisuke Yanagawa issued orders to crush all resistance using whatever means available, including artillery, and to be wary of "stragglers."[82] During "mop-up" operations, the Ninth Division, one of the units that had suffered a large number of losses, reported that they had taken care of 7,000 "stragglers." Lieutenant General Nakajima Kesago, commander of the 16th Division, stated in a diary entry that army policy was not to take prisoners but to kill them upon capture. He also wrote that disposing of several thousand people required separating them into small groups of 100 or 200 each, then later having mass burials in large trenches. Later he learned that one unit had "handled" 15,000 "stragglers" and another company 1,300.[83]

Explanations for the events after the Chinese retreat comprise a catalog of classic responses: heavy Japanese casualties promoting an attitude of revenge, Japanese attitudes about surrender, lack of discipline, and general contempt for the Chinese. A number of historians dealing with the events in Nanjing have noted that the sudden collapse of Chinese resistance caught the Japanese unprepared to deal with large numbers of prisoners and civilians. However true this may be, senior officers failed to deal with the subsequent rampage, and in some cases even encouraged the indiscriminate killing, arson, pillage, and rape that ensued.[84] While no one knows the exact death toll, based on the evaluation of the IMTFE in 1947, the official estimate is more than 200,000 dead.[85]

Chinese Resistance

After Nanjing, the Chinese army encountered major problems in Central China. Malaria took its toll, but Chinese forces inflicted heavy casualties on the Japanese. Some companies lost two-thirds of their troops. More than half of the company and platoon commanders had become casualties.[86] The Japanese faced three major problems: the Chinese army, the terrain, and the oppressive heat. Summer temperatures in the Yangtze Valley could often reach 105 degrees Fahrenheit. The Chinese used the terrain effectively, limiting the opportunities for the Japanese to utilize their superior capability in mobile warfare. In the battle for Wuhan (June 11–October 27, 1938), the Chinese counted over 255,000 casualties with 180,000 dead. The Japanese suffered 140,000 casualties, but this episode ended Japan's prewar hopes for a final showdown in Wuhan that would annihilate the main forces of the Chinese army and force them to yield.[87]

World War II: The Pacific War

Racism and strategic myopia prevented American and British policy makers from recognizing Japan's early military capabilities, compelling a larger-than-expected American investment in the Pacific War and contributing to the lack of British preparedness with regard to prime objectives like Singapore and Hong Kong. The well-publicized actions of the Japanese in China had confirmed the prejudiced attitudes that had long been part of public opinion, not only in the United States but in Britain and Europe as well. The state constitution of California (1879) forbade "natives of China, idiots, and insane persons" from voting.[88] The U.S. Naturalization Act of 1870 had expanded naturalization—that is, the process to become a citizen—to people of African descent or those originally from Africa but not to other nonwhite immigrants.

Myths about poor eyesight and other presumed congenital physical limitations along with beliefs about the inferiority of their weapons and training led to the widely shared conclusion in the West that the Japanese could not shoot, sail, fly, nor match the capabilities of Western armament. Moreover, the "inscrutable factor" emphasized that the Japanese did not think logically and rationally as those in the West did, but rather their minds worked in more elemental ways that responded to intuition and feelings rather than intellect. Even after its initial offensive netted literally a quarter of the globe in six short months, Western policy makers continued to underestimate Japanese capabilities.[89] For example, the British had actually obtained possession of a downed Zero and had a very detailed report on its capabilities.[90] The report was ignored by those higher up in the chain of command, as were other reports that went against prevailing prejudices. The preconceptions held by higher-ranking officers could not accept the fact that Japan could design and manufacture an aircraft superior to those deployed by the Western powers.[91] In fact, until the F-4U Corsair[92] and the F-6F Hellcat came into service in 1943, the West had no aircraft that could match the Mitsubishi Zero in terms of performance. As Dower notes, the impressive accomplishments of the country after the Meiji Restoration hardly suggested a people of impaired mental ability, *but people see what they expect to see and ignore contrary information.*[93]

Racism and misperception ran both ways. The Japanese colonel who planned the attack on Singapore said that "our candid ideas at the time were that the Americans, being merchants, would not continue for long with an unprofitable war, whereas we ourselves if we fought only the Anglo-Saxon nations . . . could carry on a protracted war."[94] A letter from a Japanese soldier who had killed and then disemboweled a prisoner noted that "these thick headed white bastards are thick bellied too."[95] In graphic representations in the Japanese press, the Anglo-American enemy had many different forms, such as beasts of various types, reptiles, frogs, worms, misguided stray dogs, and grubs.[96]

On the Allied side, Daws lists a potpourri of derogatory terms used by POWs captured by the Japanese: "As for the enemy, the Japanese were fucking Japs, Nips, yellow-bellied bastards, rattlesnakes, vipers, vermin, human cockroaches, mad dogs, crazed gorillas, jaundiced baboons, monkey men."[97] In his diary, Charles Lindbergh recorded his surprise at the mind-set he found among soldiers in the South Pacific who regarded the enemy at best as "yellow sons of bitches" and generally as one of the lower forms of animal life, most often as apes or monkeys.[98] In reflecting on what he heard and observed, he wrote: "What is courage for us is fanaticism for him. We hold his examples of atrocity screamingly to the heavens while we cover up our own and condone them as just retribution for his acts . . . I do not question that Oriental atrocities are often worse than ours. But . . . we are constantly telling ourselves, and everyone else who will listen to us, that we are the upholders of that is 'good' and 'right' and civilized."[99]

The impact of the harsh training and indoctrination in the emperor cult became apparent from the very first land engagements. At Guadalcanal (1942–1943), the first battle to take back territory initially taken by the Japanese, all but 128 of the original 917 members of the Ichiki Regiment's First Element were killed in the battle. In a retrospective on his war experience, William Manchester, who fought there as a sergeant in the marine corps, reports that General Alexander Vandergrift wrote his superior: "General, I have never heard or read of this kind of fighting. These people refuse to surrender." Manchester continues, observing:

> Having been introduced to the enemy's code of total resistance, defiance to the last man, the Marines had no choice; they had to adopt it themselves. From then on until the end of the war, neither side took prisoners except under freakish circumstances. It was war without quarter: none was asked, none was given.[100]

Prying the Japanese out of their positions required an overwhelming application of American firepower. As the American island-hopping advance approached the Japanese Home Islands, the Japanese fought with increasing ferocity, demanding even more resources in terms of men, equipment, and supplies. Dower confirms this, concluding: "By the final years of the war against Japan, a truly vicious circle had developed in which the Japanese reluctance to surrender had meshed horrifically with Allied disinterest, on the battlefield and in decision-making circles, in taking prisoners or contemplating anything short of Japan's throughgoing defeat."[101] Bob Green, a tank platoon commander in the Okinawa invasion, wrote to his mother: "Well, I'm back and got along fine today . . . I feel like Genghis Khan tonight as we burned, blew up, ran over, covered up, sealed in caves & just plan shot around two hundred Nips—I just had five tanks & two flame thrower tank . . . This is one place there is no bag limit on game."[102] At Tarawa, only 17 of a Japanese force of 4,836 surrendered. In New Guinea, 95 percent of the 200,000 Japanese troops sent there died.

Tales became more gruesome as the war progressed, particularly during the last six months of fighting as the Allied advanced toward the Japanese Home Islands. Because of horror stories detailing alleged American atrocities, Japanese troops massacred their own people, including civilians, presumably to preserve their honor and save them from American brutality. Civilian families were expected to give themselves up in an active self-sacrifice for the emperor. At the end of the war, in the battle for Manila, the Japanese considered all Filipinos, man, woman, or child as guerilla fighters. A recent history of the struggle states that "the charred bodies half-buried in the ruins bore terrible witness to a message beyond the nightmare of any Manileño. An estimated 100,000 Manileños had been killed."[103] In Okinawa, the final amphibious operation of the war, the United States had 7,000 dead and took 7,400 prisoners. The grim toll on the other side included the ritual suicide of all senior Japanese officers as well as many subordinates and civilian officials. Local Japanese commanders ordered the civilian population to commit suicide rather than surrender. Estimates place Japanese military losses at 110,000. In addition, approximately *35 percent* of the island's 450,000 civilian population were killed or committed suicide.[104]

Japanese POW Policy

During the first Sino-Japanese War (1894–1895), the Russo-Japanese War (1904–1905), and World War I, Japan had vowed to comply with international law with respect to the treatment of POWs. During the first Sino-Japanese War, although Japan had not signed the Brussels Declaration (1874), it vowed to follow its principles. In the Russo-Japanese War, the Japanese took almost 80,000 prisoners, treating them exceptionally well. The same benign attitude governed the treatment of those prisoners taken in World War I.[105]

Post World War I, the generational change in leadership that had promulgated the new military code and emperor cult signed the 1929 Geneva Convention but never ratified it. Imbued with the new ideological commitment to self-sacrifice for the emperor, the Japanese military opposed ratification because they expected Japanese soldiers to fight to the death, and if placed in untenable situations, to commit suicide rather than surrender.

The idea that surrender was shameful carried over to their treatment of POWs. Because these soldiers had not fought to the death or committed suicide, they were considered cowards, not worthy of respect as fellow soldiers. The harsh treatment that Japanese troops endured from their superiors also played a role in that they had few qualms about inflicting violent punishment for minor infractions of rules, or often for no reason at all. Prisoners, even those used as forced labor, received little food and virtually no medical attention. At best, Japanese forces treated POWs as military supplies to be used up or discarded as necessary, an attitude reflected in their treatment of the comfort women as well.

Hell Ships

The Japanese had taken a very large number of prisoners during their initial offensive. A decision on their disposition was made very quickly—they would be used as slave labor. This required transporting a large number to destinations other than the place of capture. For this task, the Japanese used unmarked freighters. In Southeast Asia, the British, Australian, and Dutch prisoners were transported from Keppel Harbor in Singapore to various construction sites in territories occupied by the Japanese. Americans taken in the Philippines were transported from Manila as U.S. forces prepared to invade. The Japanese used unmarked freighters that made easy targets for submarines and aircraft. On board, prisoners literally often had standing room only and virtually no sanitation facilities. Starvation, suffocation, and disease took its toll.

Allied subcommanders and pilots had no way of knowing if the ships they attacked carried POWs. If an attack on a ship occurred, the prisoners stood little chance of survival because the Japanese battened down the hatches, leaving the prisoners below in the holds. Narratives of survivors claim that the crew of the *Lisbon Maru* used prisoners in the water for target practice as the ship went down. Other accounts claim that the crew of the *Shinyo Maru* machine-gunned survivors while they were in the water. Another hell ship, the *Arisan Maru*, lost all but eight of its entire human cargo of 1,800 American POWs when sunk by a U.S. submarine. The Japanese list 23 ships lost altogether. POWs who survived hell ship voyages were then forced to work in mines, factories, and docks owned by Japanese companies such as Mitsui, Mitsubishi, and Nippon Steel. Beatings and other abuse continued while adequate food and medicine were never provided.[106]

A Final Note

Cognizant of the gross violations of the 1929 Geneva Conventions and the customary laws of war, almost immediately after the Japanese surrender, the Ministry for the Army sent orders to destroy all POW records as well as those related to the comfort women. Tanaka notes that military leaders attempted to place primary blame for mistreatment on the Formosan and Korean camp guards. In addition, he asserts that some existing evidence suggests that they had plans to massacre the prison guards.[107]

On the other side, one should keep in mind that the Allies also did not feel obligated to treat Japanese prisoners, when taken, according to the standards in the Geneva Conventions. In part, one can attribute this to knowledge of Japanese mistreatment of Allied POWs and a perception that better treatment of Japanese POWs would not result in reciprocity in terms of better treatment for Allied POWs. Second, as discussed earlier, the brutal nature of the fighting along with rumors of Japanese atrocities engendered a "take no prisoners" attitude, which produced an indifference to the fate of prisoners when they were taken. As with the eastern front in the European War, the clichés that "all gloves are off" and "no holds barred" have special relevance because they describe the attitudes on both sides.

GERMANY AND THE SOVIET UNION

Field Marshal Keitel's statement introducing this chapter clearly reflects the sentiments of Clausewitz about the potential unlimited nature of war, but it also embodies the ideological premises of the Nazi war effort. In general, the Germans had no mercy in Poland, Russia, or the eastern front. The invasion of Poland that began World War II had as its goal the total destruction of Polish identity and state and apparatus as part of gaining *Lebensraum* ("living space") for Germans in Eastern Europe. The two plans essentially entailed ethnic cleansing on a massive scale. Implementation would mean deporting or exterminating the non-German populace, or relegating it to the position of slave labor. *Generalplan Ost* (General Plan for the East)[108] and the related *Generalsiedlungsplan* (General Settlement Plan)[109] called for the resettlement of 12.5 million Germans into Slavic areas, including Poland. Some versions proposed the relocation of at least 100 million Germans over a century. The Slavic inhabitants of those lands would be eliminated or enslaved or resettled farther east, into less hospitable parts of Eurasia beyond the Ural Mountains, such as Siberia in Russia. Upon completion of the plans, no Slavs, Jews, or Gypsies would be left in Eastern Europe.

On the battlefield, this translated into giving no quarter in Eastern Europe. The Germans dealt with Soviet prisoners of war in accordance with the presumptive "subhuman" nature accorded to Slavic ethnicity. Under the legally insupportable pretext that the Soviet Union had not signed the Geneva Convention (1929), the Germans dealt with Soviet prisoners with horrendous brutality. The military leadership of the *Wehrmacht* (German army) had accepted the Nazi characterization of the Soviet population as a "subhuman" race. They did not resist the idea of the war as a racial conflict that entailed the virtual annihilation of the enemy or at least its leadership cadre as a legitimate objective.[110] Many captured Soviets were executed on the spot, died as slave laborers, or ended up in death camps. Of the 5.7 million Soviet prisoners taken by the Axis powers, 3.3 million died from disease, starvation, and ill-treatment.[111] This figure, when compared with the 8,348 Western Allied prisoners who died in German POW camps (of a total of 232,000) starkly illustrates the radically different treatment given to those soldiers captured on the western front.

On the other side, prisoners taken by the Soviet Union also faced a grim fate. The Soviets had sent the United States a note that said that it would only observe the customary and conventional laws of war if the Germans did so also.[112] In September 1939, when the Soviets began to arrest, deport, and execute Polish intellectuals in their occupied zone of Poland, their policy did not differ in any substantive way from that of the Germans in Western Poland. Thousands of Polish soldiers captured following the Soviet invasion of Poland in September 1939 were executed. More than 20,000 Poles were killed in the Katyn Forest massacre.[113] Of the almost 100,000 Germans captured following the Battle of Stalingrad, only 5,000 survived the war. Many German captives were sent to labor camps in the depths of Russia, where hunger, exhaustion, and freezing conditions killed thousands. When the Soviets turned the tide on the eastern front, they routinely refused to take prisoners. One Soviet sergeant justified the policy: "The rule of war is that you go into battle, you see the enemy, and that enemy is not a human being. Putting your hands up isn't going to save you."[114]

The Red Army had little respect for the civilian population in Eastern Europe. The Soviets had lost 80,000 men in a slow campaign of attrition. The fall of Budapest saw systematic pillage and rape in revenge. A young Russian officer described a scene in East Prussia:

> Women, mothers, and their children lie to the right and left along the route, and in front of each of them stands a raucous armada of men with their trousers down . . . [A] group of grinning officers stood nearby one of whom was directing—no he was regulating it all. This was to make sure that every soldier without exception took part.[115]

He described a later scene where they found mutilated bodies of rape victims with wine bottles stuck in their vaginas.[116] Another soldier wrote home: "Happy is the heart as you drive through a burning German town . . . We are taking revenge for everything and our revenge is just. Fire for fire, blood for blood, death for death."[117]

Stalin's Order 270 (July 28, 1942)

During the initial phase of the war, the Red Army suffered a number of defeats with huge casualty rates. Desertion had become a major problem. Stalin's remedy produced a new slogan: "Not a step back!" Order 270 directed the formation of penal battalions for those officers who ordered a retreat without authorization from the High Command and that each army must create "blocking detachments" or barrier troops that would capture or shoot "cowards" and fleeing panicked troops at the rear.[118] Penal battalions would draw assignments to the most dangerous areas of the front "to give them an opportunity to redeem by blood their crimes against the Motherland."[119] Stalin withdrew the requirement for armies to maintain companies of barrier troops after just three months. Intended to galvanize the morale of the Soviet Army and emphasize patriotism, it generally had a detrimental effect. Soviet commanders viewed diverting troops to create barrier units as a waste of manpower, so by October 1942 the idea of regular blocking units quietly disappeared.

It was one thing to insist on sacrifice but quite another to be making it. Soviet soldiers knew that shooting those considered cowards and shirkers was a common practice. Very few would not have heard about, or seen, at least one summary execution of a laggard or deserter drawn aside and shot without reflection or remorse. The Soviets formally sentenced about 158,000 men to execution during the war. Add to this the thousands whose lives ended in roadside dust, the stressed and shattered conscripts shot as "betrayers of the Motherland."[120] At Stalingrad, as many as 13,500 men are thought to have been shot by their own comrades in the space of a few weeks.

Western Europe

In Western Europe, Germany followed a quite different course. A war against "civilized" Anglo-Saxons, although necessary, still required very different tactics in that the conventional and customary rules of war applied. Sporadic violations occurred on both side, but nothing approaching the systematic slaughter in the east. Late in the war, several incidents occurred. During the Battle of the Bulge (December 1944), *Kampfgruppe Peiper*, under the command of SS-*Standartenfuehrer* (Colonel) Joachim Peiper, was responsible for one of the more prominent incidents of atrocity on the western front—the Malmedy massacre of 86 captured Americans.[121] Before the Allied relief effort, several thousand Americans were surrounded and captured during the battle. During the brutal winter of 1944–1945, the Germans forcibly marched these and other Allied POWs across the country in an effort to keep them from being liberated by the advancing Allied armies.[122] Although Malmedy became the most publicized incident, on December 18, the day after the massacre at Malmedy, the same SS unit of *Kampfgruppe Peiper* systematically executed 130 Belgian civilians in the village of Stavelot.[123]

Sporadic violations occurred on the Allied side as well. Knowledge of the Malmedy massacre led to retaliation against German prisoners of war during and after that battle. For some time after, American troops took very few German prisoners. On January 1, 1945, U.S. soldiers killed 80 German POWs in what became known as the Chenogne massacre. At the Saar River, the 90th Infantry Division executed *Waffen-SS* prisoners in such a systematic manner that late in December 1944 division headquarters had to issue explicit orders to take prisoners for purposes of information.[124] While Peiper stood trial after the war and served 10 years in prison, no American soldiers were ever subject to a court-martial for their actions.

IRAQ, ISIL, AND ISIS

ISIL and ISIS both reference a common set of beliefs. ISIL stands for the Islamic State of Iraq and the Levant and ISIS for the Islamic State in Iraq and Syria. Both subscribe to the teachings of Mohammed ibn Abdul Wahab, an 18th-century Sunni preacher who sought to purify Islam. Members of the Wahab movement in Saudi Arabia believe that their role is to reform Islam, to free it from heresies, innovations, superstitions, and idolatries. Although closely associated with the Salafi movement, an ultra-conservative orthodox movement within Sunni Islam, while all Wahabis are Salafist, not all Salafists are Wahabi. Many scholars claim that Salafism is a term applicable to several forms of puritanical Islam in various parts of the world, while Wahhabism refers to the specific Saudi school, which they see as a more austere form of Salafism. Wahabis (and Salafists) consider all Shia as unbelievers and *rafida* (rejectionists).[125]

The basic beliefs of the two movements can be summed up as attempting to emulate as closely as possible the Prophet Muhammad and his earliest followers—*al-salaf al-salih*—the "pious forefathers," which entails a strict adherence to the *sharia* (Islamic law). Wahabis/Salafists do not listen to music, nor watch television, nor draw pictures of living things that might have a soul. ISIS and ISIL represent a small minority that believes that purification requires a jihad against unbelievers in order to establish the governing caliphate.

ISIL started in the early years of the Iraq War and associated itself with al Qaeda in 2004. Composed of various insurgent groups, ISIL aimed to establish a caliphate in the Sunni majority regions of Iraq, later expanding this to include Syria.[126] In February 2014, after an eight-month power struggle, al Qaeda cut all ties with ISIL.[127] In March 2015, the UN Human Rights Office published testimonies from 100 people who survived attacks by the armed group in Iraq between June 2014 and February 2015. The report documents alleged atrocities and abuses committed by the fighters, including killings, torture, rape and sexual slavery, forced religious conversions, and the conscription of children. The UN report also described cases of killings, torture, and abductions allegedly carried out by Iraqi security forces and Shia militias battling ISIL.[128]

The report gave particular attention to an alleged genocide in 2014 against members of the Yazidi sect, a minority religious group considered to be devil worshippers by ISIL. In August, ISIL allegedly launched a series of systematic attacks on the Yazidis' heartland in Iraq's northern Nineveh province, separating out men and boys over the age of 14 to be executed, while younger boys were forced to become child soldiers. Women and girls were taken as "spoils of war" to be sold into sexual slavery or given to ISIL members as rewards. Some villages "were entirely emptied of their Yazidi population."[129] According to the report, ISIL has also targeted other religious and ethnic groups, including Christians, Turkmen, Kurds, and Shias, according to the report. In June, ISIL fighters attacked the Badoush prison, dividing the 3,000 inmates into groups, freeing the Sunnis, and loading the remaining 600 mainly Shia inmates onto trucks before driving them to a ravine and shooting them.[130] A separate UN investigation into the situation in Syria has also found that ISIL was committing large-scale atrocities in the war-ravaged country, likely amounting to war crimes and crimes against humanity.[131]

CHAPTER 7

Aerial Warfare

I hope there was no one in that building except soldiers—no women, no children. I will never know. There is no time to think about it.

—Charles A. Lindbergh[1]

It was wrong for infantrymen to destroy a village with white phosphorous grenades, but right for a fighter pilot to drop napalm on it.

—Philip Caputo[2]

PERSPECTIVE

The development of regulations relating to aerial warfare gives us a graphic lesson in the tension between humanitarian concerns and the perceived necessities for military effectiveness. This theme will also form a central focus of chapter 8 on prohibited weapons. The Lindbergh quote heading this chapter captures the central dilemma of air warfare—the difficulty of discrimination from the air. As he noted, "it is difficult to identify buildings when one is flying at tree-top level."[3] As a civilian "consultant," Lindbergh flew 50 combat missions in the Pacific theater. This entry from his journal describing his reaction to a strafing run he made on a beachfront cottage during one of his first flights captures a fundamental dilemma associated with aerial and naval warfare—observing the requirement for discrimination between civilian and legitimate military targets. The open city bombing in World War II also raises the question of discrimination as well as that of proportionality. Despite technical advances, the problem still persists. A U.S. aircraft attacked a *Médecins Sans Frontieres* clinic in the Afghan city of Kunduz because the crew mistook the clinic for a nearby government building that had been seized by Taliban. The October 2015 attack killed at least 30 civilians as part of a campaign to retake Kunduz from Taliban forces. The United States attributed the action to "human error."[4]

Airpower has formed an essential component of military operations since the beginning of World War II. Arguably the Royal Air Force (RAF) played a pivotal role in saving Great Britain from German invasion. Airpower played a central role in German blitzkrieg tactics, and air superiority paved the way for eventual Allied victory in both the European and Pacific theaters. In particular, when one thinks of the Pacific theater, the epic naval battles involved aircraft carriers, not battleships. By the 1990s, in response to a public opinion in many countries that expressed an increasing aversion to casualties, reliance on airpower had become the preferred operational strategy in lieu of overt intervention that necessitated placing "boots on the ground." General Wesley Clark attributes this to the continued scrutiny by the media and to "technology, international law, twenty-four hour news coverage, and a resource-rich American military that is the heir of all the military developments and tragedies of the twentieth century."[5] The increased use of unmanned drones in contemporary warfare has raised numerous issues.[6] On the downside, the German "blitz" that targeted London, Liverpool, and Birmingham; the destruction of Hamburg,[7] Dresden, and Tokyo, as well as the toll taken by the bombing of other German and English cities targeted for war-related industries; and the devastation of Hiroshima and Nagasaki by atomic bombs provide vivid pictures of the horrendous and widespread suffering that air warfare can create.

REGULATING AIR OPERATIONS

In 1901, H. G. Wells, writing in the *American Review*, made an interesting prophecy. He foresaw the invention of the airplane, but the remarkable part of the article comes from his statement about how aircraft would change the nature of war. He asserted that wars of the future would be decided by struggles for air superiority and that the civilian population would suffer the consequences:

> The victor in that struggle will tower with pitilessly, watchful eyes over his adversary, will concentrate his guns and all his strength unobserved, will mark all his adversary's roads and communications, will sweep them with sudden incredible disasters of shot and shell. The moral effect of this will be enormous. All over the losing country, not just on the frontier, but everywhere the victor will soar. Everybody, everywhere will be perpetually and constantly looking up, with a sense of loss and insecurity, with a vague sense of painful anticipation.[8]

Schmitt observes: "Despite its decisive role in modern warfare, the air paradoxically remains the operational domain that is least regulated by treaty law."[9] As noted in earlier chapters, treaties governing aspects of land and naval warfare (Hague Conventions) were developed over a century ago, and even military activities in space have been regulated for almost

50 years.[10] Yet states have never developed any international humanitarian law instruments that specifically apply to air warfare. This does not mean that air warfare exists outside of all legal regulation, because some general IHL treaties include requirements that apply to aerial operations. In addition, state practice and customary law apply as well. Nonetheless, regulation remains rudimentary in form and arcane in application.

Even before the invention of powered flight, humans have sought to use the air to gain an advantage in war. Initially, the military uses of flight focused on reconnaissance, in particular gaining an overview of battlefields. Early attempts saw the use of manned kites in China and Japan and later the use of hot air balloons as seen in the American Civil War, Napoleonic Wars, and by the French in the siege of Paris in 1870.[11] The 1899 Hague Peace Conference adopted a declaration that prohibited the "launching of projectiles and explosives from balloons, or by other methods of a similar nature."[12] This declaration expired in 1905. During the period between the two Hague Conferences, considerable progress occurred in aviation technology. The possibility that aircraft might comprise a valuable asset in future wars induced many states, especially the Great Powers, to adopt a very reserved attitude. Note that this attitude has applied to technological advances in general. *Available technology has shaped the nature of all wars*. Often tactical and strategic doctrine lagged far behind technical developments. As one example, until the shock waves produced by Sputnik, the U.S. Air Force failed to embrace the idea that ballistic missiles might be the wave of the future because of their adherence to a strategy based on manned bombers flowing from World War II.

The 1907 Declaration was to remain in force until the projected Third Peace Conference (1914), which never met because of the outbreak of World War I. Because the third Hague Conference never convened, the Declaration of 1907 technically remains in force today, even though it has no meaningful impact. Many of the important states, however, such as France, Germany, Italy, Japan, and Russia, did not sign or ratify it. Austria-Hungary signed but did not ratify it. Of the Great Powers, only Great Britain and the United States ratified the declaration. The United States formally renounced it in 1942. The attempt in 1907 to adopt a permanent prohibition of the discharge of projectiles from the air led to the insertion in Article 25 of the Hague Regulations on land warfare, which does prohibit the attack or bombardment of undefended towns and villages "by whatever means," which would cover attack or bombardment from the air.[13] Schmitt notes that the sole attempt to regulate air war came in a 1911 resolution issued by the Institut de Droit International, which stated that air warfare should not place civilians and civilian policy at greater risk than that from naval or land warfare.[14]

Of course, World War I saw the rapid evolution of the airplane and air power. In many respects it was a war of "engineering" in that it provides a lesson in the impact of technological advances of modern war as well as the impact of technology on modern war. Aircraft technology developed rapidly, especially in the area of weaponry. The same held true for World War II. Consider the evolution of the airplane over 15 years from the Wright brothers' flight of 59 seconds and 852 feet in December 1903 to the relatively sophisticated fighters with forward-firing machine guns in 1918 and bombers that had over a 500-mile range. At the beginning of the war, aircraft were used primarily for reconnaissance as well as forward observers for artillery. Early aircraft were at first unarmed then later defended by crew with pistols or rifles or even thrown darts or small hand bombs. Mobile radio and telephone technology had not yet been developed, so communication was extremely difficult.

Given design and technical limitations, a typical 1914–1918 aircraft could carry only a very small bomb load. The bombs and the methods of attaching them to the aircraft were of rudimentary design. Without bombsights, targeting relied on the pilot's judgment. The Germans did carry out numerous raids on British cities, hoping to cause widespread panic and even uprisings. In this they failed, but the raids did tie down a large number of aircraft, antiaircraft guns, and personnel that otherwise could have been used directly on the western front. Nonetheless, air operation, while contributing to wartime tactical efforts, did not have a decisive role in moving either side toward a negotiated peace.

Giulio Douhet

In terms of doctrine, Italian general Giulio Douhet wrote *The Command of the Air* (1921), which still stands as the defining work on the possibilities associated with air operations. Published in 1921, *The Command of the Air* foresaw the utility of strategic bombardment before aviation advocates in other countries had given that subject any detailed thought. The 1927 edition, still in print, contains Douhet's fully developed thesis on how to use the air weapon to achieve victory. Subsequently translated into English, French, German, and Russian, it stimulated the thinking of aviators in various countries prior to World War II. Douhet believed that because of its mobility, the airplane had revolutionized warfare. For Douhet, the airplane, with "complete freedom of action and direction," provided the means to attain quick victory without first defeating enemy surface forces. His principal thesis relied on command of the air as essential to attaining victory in war. With command of the air, one's own air force is free to operate whenever and wherever it desires, while the enemy's air arm is rendered permanently helpless. The enemy then would have no effective defense against the ensuing air attacks.

Finally, Douhet argued that all future conflicts should be unrestrained, total wars. No longer should there be a distinction between belligerents and nonbelligerents. The requirements of modern war meant that everyone takes part. States win wars by crushing the resistance of the enemy—an action that can be accomplished more easily, faster, more economically, and with less bloodshed by attacking the weakest points in that resistance, namely, the vital centers (cities) and civilian morale.[15] He felt that "a complete breakdown of the social structure cannot but take place in a country subjected to this kind of merciless pounding from the air. The time will soon come when, to put an end to the horror and suffering, the people themselves, driven by the instinct of self-preservation, would rise up and demand an end to the war—this before their Army and Navy had time to mobilize."[16] One sees the basic assumptions of Douhet's philosophy in the tactics used by both the Axis and Allied air forces during the Second World War.

The Hague Rules

In the aftermath of the Washington Conference on the Limitation of Armament (1922), the conference delegates agreed to establish a commission of jurists to investigate the potential legal issues connected to air operations.[17] Their report, issued in 1923, became known as *The Hague Rules of Air Warfare*.[18] In many respects, the rules embody principles reflected in the 1907 Hague Treaties governing warfare on land. While not a treaty, the document had enormous influence as "soft law." The following articles have particular relevance:

> ARTICLE XX
>
> When an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent.
>
> ARTICLE XXII
>
> Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.
>
> ARTICLE XXIV
>
> 1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

The obligations in Articles 22 and 24 have been included in Articles 51 and 52 of Additional Protocol I to the 1949 Geneva Conventions. Note again the United States has not ratified PA-I.

Incidents in the interwar period confirmed beliefs that aircraft could contribute significantly to success on the battlefield but also that their use could drastically affect the well-being of the civilian population.

The infamous bombing of Guernica (1937) by the Condor Legion of the German Air Command during the Spanish Civil War killed 300 people and did shatter the will of the defender to resist.[19] At the time, most Western nations condemned the operation as one that had only terror as its goal. During World War II, despite the fact that both sides violated the prohibition against attacks on civilians, each still accused the other of breaches of The Hague Rules as violations of customary law.

WORLD WAR II

The devastation produced by bombing raids during World War II raised many questions. Technological developments in aviation occurred so quickly that aircraft in production were often obsolete before being deployed. The Second World War saw the bomber come of age. With an enormous increase in bomb load, armament, and range, the bomber brought destruction to cities on a scale never seen before, although the strategy and effectiveness of large-scale bombing of cities has always been highly debatable in the West. Almost from the beginning, the British made no distinction between soldier and civilian. The Polish campaign and the bombing of Rotterdam in May 1940 had convinced the British military that the Germans had deliberately engaged in terror bombing and would continue to do so. Hitler had described the tactic as *Schrecklichkeit* (frightfulness), the use of terror to break a country's will to resist. It worked at Rotterdam, but the overall effectiveness of air strikes as the means of breaking the enemy's will to resist remains debatable. British Air Marhal Arthur Harris said: "What we want to do in addition to the horrors of fire is to bring the masonry crashing down on top of the Boche, to kill Boche, and to terrify Boche."[20]

The United States, on the other hand, stressed "precision bombing." In theory, precision bombing appeared to be a much more efficient method than area bombing, but operational problems made precision bombing less effective than its advocates expected. The Norden bombsight enabled the U.S. Army Air Force (USAAF) to bomb with impressive accuracy in clear weather, but the weather over Germany was rarely clear. Moreover, finding the critical point in the enemy's war industry required extremely detailed and accurate intelligence about the nation's economy. This comprised information the enemy clearly wished to keep secret. Targets considered critical were those the enemy defended most fiercely and made them harder to hit through dispersal or placing them underground. The Germans under heavy assault still managed to rebuild quickly when they were hit. Area bombing, on the other hand, did not require such accurate intelligence about the enemy, and since area targets were much larger than precision targets, area bombing could be done effectively by crews and equipment that could not hit precision targets. Area bombing could also be done under more diverse conditions, such as nightime and bad weather, which made the targets harder to hit but also made the bombers harder for the defenders to find and attack.[21]

Most discussions of bombing in general focus on two questions: what were the strategic effects, and was it moral? As Richard Overy has noted, these two questions have generated more heat than light.[22] Dower writes that American planners believed that obliterating the distinction between combatants and civilians could be justified by an examination of German and Japanese policies and propaganda, which asserted that every person played a vital part in the nation's military mission.[23] Even prior to the attack on Pearl Harbor, American military strategists had envisioned an all-out war that included the incineration of Japanese "paper cities." Long before the final wave of attacks on Japanese cities, the USAAF used incendiary bombs against German cities as a prelude. In terms of casualties and deaths, studies have estimated that 85 percent resulted from fire rather than high explosives. After the first raids on Hamburg, the mayor wrote:[24]

> The streets were covered with hundreds of corpses. Mothers with their children, youths, old men, burnt, charred, untouched and unclothed, naked with a waxen pallor lie dummies in a shop window, they lay in every posture, quiet and peaceful or cramped, the death struggle shown in the expression on their faces.

An air plan for the defeat of Japan euphemistically spoke of "the dislocation of labor by casualty."[25]

Hamburg and Dresden

In the European theater, Hamburg and Dresden became the symbols of indiscriminate bombing. The raids on Hamburg were devastating. Critics of the attacks on Dresden have argued that the city contained no targets of military significance and claim that the attacks were needlessly destructive and strategically unnecessary. The RAF and the USAAF conducted back-to-back missions on the night of February 13, 1945, and during the next day (February 14) that involved 360 heavy RAF bombers in the first attack and 316 U.S. B-17s in the second. The British attack centered on the *Ostragehege* sports stadium, next to the city's medieval Altstadt (old town), which had highly combustible timbered buildings situated close together. The Allied forces dropped 4,000 tons of bombs in less than 24 hours. About 40 percent of the bombs dropped were incendiaries. The incendiary bombs created a firestorm that caused Dresden to burn for a week. The bombing destroyed about 80,000 homes and left 250,000 homeless. Overy writes that the "firestorm, like the Hamburg conflagration, left bodies mummified or reduced to ash, making the final count difficult." The death toll has been somewhat controversial, but modern studies have set the number at about 25,000.[26] Many have argued that the destruction of Dresden was a war crime that went unpunished.

British air marshal Harris argued that "attacks on cities like any other act of war are intolerable unless they are strategically justified. But they are strategically justified in so far as they tend to shorten the war and preserve the lives of Allied soldiers."[27] On February 3, 1945, Berlin was hit by 1,000 B-17s, escorted by a 1,000 fighters, and again on February 26 by over 1,100 B-17s. As the war drew to a close, because the Allies had established air superiority, the bombers found little resistance in the air other than from antiaircraft fire. Cologne, a city already leveled, had 4,666 tons of bombs dropped on it from 1,000 bombers on March 24, 1945. Würzburg was hit with 1,127 tons. In 19 days in April, the USAAF dropped 46,728 tons of bombs on various targets.[28]

Japan

The military used "marshalling yards" and similar euphemisms to justify targets, even when the operation involved a high percentage of incendiary bombs. A well-hit "marshalling yard" meant "block upon block of residential areas gutted, families left homeless . . . and workers and others—including women and children—blown to bits, or more likely, burned."[29] Bad weather conditions that obscured the ground below simply meant that the pilots dropped their bomb load over what they believed to be the target. From an early date in the war, the United States had planned to target Japanese urban industrial areas. The plan had to wait until the island-hopping strategy resulted in a strategic position that provided bombers with a comfortable operational distance from their primary bases. The United States actually built test houses at Dugway Proving Grounds in Utah to test the power of incendiary bombs against various structures. For Japan, they used an architect who had lived in Japan. The houses were built with wood approximately equal to that used in Japan and used adobe plaster to replicate the mud plaster used in Japanese homes. Reports from the tests confirmed the common knowledge about Japanese cities—the Japanese population and war industries were densely concentrated in cities that were "potential tinderboxes waiting to be ignited."[30] Reports also emphasized the effects from incendiary attacks—greater inflammability of residential construction, greater congestion, reduced worker efficiency, larger casualties among workers, damage to transportation networks, and the concentration of war industries in a few major cities.

High winds and cloud cover hampered the first operations, making the idea of "precision bombing" an oxymoron. On the night of March 9–10, 1945, General Curtis LeMay ordered a low-altitude night operation against Tokyo. This marked a change in U.S. tactics. The planning documents explicitly included the intention to kill large numbers of Japanese civilians; it was approved at every level, from the individual aircrew to the Joint Chiefs of Staff. In his final report on how he conducted the air war, LeMay used heavy Japanese civilian casualties as the measure of his success. Although urban incendiary bombing was not LeMay's idea or initially his primary choice, he made it work in spectacular fashion. The Tokyo raid became one of the most destructive air raids in history. By the time the fires died out the next morning, nearly 16 square miles of the city had been destroyed, leaving at least 83,793 Japanese civilians dead, more than 40,918 injured, and over 1 million homeless.[31] The raid destroyed close to one-quarter of Tokyo's buildings. In his memoirs, LeMay described the victims as being "scorched, and boiled and baked to death."[32] Successive attacks on Tokyo in April destroyed another 17 square miles of the capital. In Tokyo alone, the raids devastated 56 square miles, which comprised slightly over 50 percent of the city.[33]

In the period leading up to the use of the atomic bomb, LeMay's forces bombed 58 secondary cities. In terms of "square miles destroyed," a very crude measure of effectiveness, it was determined that the destruction ranged from 40 percent to 99.5 percent (Toyama, population 128,000). A military photographer, Joseph Swope, spoke of dead cities, ghost cities, and "cities bombed into nothingness," which was not far from the reality of the destruction.[34] When designating these "secondary targets," the first consideration of planners was "congestion and inflammability" or "combustibility." Many of these secondary targets had little or no industrial importance—the goal was simply to produce a crippling shock effect as a means of destroying morale. In the final month of the war, many cities were chosen for destruction because they were seen as highly combustible targets of opportunity.[35] R. J. Rummel, among many others, asserts that the indiscriminate urban bombing of Germany and Japan constituted democide, or murder by government. He argues that "the worst of these democidal bombings was the firebombing of Japanese cities, almost entirely carried out by American bombers, and designed and commanded by General Curtis LeMay."[36]

The Atomic Bomb

Four days after 70,000 to 80,000 citizens of Hiroshima died and many thousands more were injured from the atomic bomb blast on August 6, 1945, half as many residents of Nagasaki met a similar fate. The Strategic Bombing Survey (1946) estimated that 15–20 percent of deaths occurred from radiation. The difference, of course, is that death would have occurred later. In fact, we may never know the exact total because of the long-term effects of the radioactivity. The day of the attack on Nagasaki, the Japanese communicated to the United States their urgent desire to surrender, subject only to the condition that they might keep their emperor. On the next day, the

United States accepted that condition with the stipulation that, until total demilitarization had been achieved and other Allied demands had been met, "the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied Powers." Three days later, on August 14, Japan accepted the stipulation, and the war was over. Not surprisingly, many gave principal credit to the new weapon for bringing the most destructive war in American history to an end.

Secretary of War Henry Stimson articulated a strategic rationale for the use of the atomic weapon as an afterthought to the decision to use it:[37]

> We estimated that if we should be forced to carry this plan to invade first Kyushu and then Japan's main island of Honshuto its conclusion, the major fighting would not end until the latter part of 1946, at the earliest. I was informed that such operations might be expected to cost over a million casualties, to American forces alone. Additional large losses might be expected among our allies, and of course, if our campaign was successful and if we could judge by previous experience, enemy casualties would be much larger than our own.

In the spring of 1945, the capacity of the Japanese air force to defend its homeland against escalating bombardment had rapidly deteriorated. This information, accompanied by a sharp drop in losses of American planes and pilots, convinced Acting Secretary of State Joseph Grew, who had earlier in the war served as the U.S. ambassador to Japan, that the Japanese would be open to a negotiated peace. This path was never explored because in the minds of most of the top military and civilian officials of the government, the decision made by Roosevelt in 1942 to develop the atomic bomb carried with it the implicit intention to use it as soon as it became available if it would shorten the war.[38]

The combination of the unquestioned legitimacy of the bomb as a military weapon and the double rationale for using it quickly—its shock value to end the war abruptly and save whatever the number of lives, and its effectiveness in forestalling the Soviets from what might be large military gains and corresponding political demands in East Asia—were strong influences on Truman when he made his decision in Potsdam. After the successful test of the atomic bomb on July 16, 1945, President Truman and his advisers felt sure that they had the means to end the war quickly without any concessions to or negotiations with Japan. The Soviets had every reason to want to carry out their pledge to enter the war on or about August 8, thus staking out a share of the credit for the Pacific victory and the division of power in its aftermath. To fault Truman in hindsight for that decision would be to ignore the circumstances and atmosphere that surrounded it.[39] The crew of the *Enola Gay* had few qualms, although several in retrospective evaluation expressed the thought that it should never happen again. Colonel Paul Tibbets summarized the thinking of his personally selected crew: "I had no problem with it. I knew we did the right thing because when I knew we'd be doing that I thought, yes, we're going to kill a lot of people, but by God we're going to save a lot of lives. We won't have to invade [Japan]."[40]

Assessing Effectiveness

The USAAF and the RAF had both made extravagant claims about the effectiveness of airpower. Certainly, the B-17s, B-24s, and B-29s were impressive aircraft, and the combined bomber offensive against Germany was dramatically more impressive than any previous bombing campaign. But the Allies did not defeat Germany with airpower alone—the Soviet Red Army, the Allied forces in Italy, and the D-day invasion of France, for example, proved ground combat to be far from out of date, as did the deadly island-hopping warfare in the Pacific.

The fire attacks had severely damaged the Japanese economy. The bombing severely reduced the ability of Japanese armed forces to resist an invasion of the Home Islands. Yet the simple fact was that the most flammable areas did not contain the most important war plants. The bombing, along with the destruction of the Japanese merchant marine and the sea-air blockade, certainly cut off vital resources. The bombing brought the war home to the general population in the harshest manner possible. It involved not only the physical ruin but also the psychological impact of creating terror.

A press release extolling the role of the USAAF estimated that it had produced 310,000 civilian deaths and another 412,000 injured and 9 million made homeless. The release asserted that for "five flaming months . . . a thousand All-American planes and 20,000 American men brought homelessness, terror and death to an arrogant foe, and left him practically a nomad in an almost cityless land."[41] Ronald Shaffer argues that despite all the damage, an Allied invasion would still have resulted in a large number of casualties on both sides because of the Japanese ethos of death before dishonor. In the end, strategic bombing did force the Japanese to choose between further resistance or facing the reality of a continued campaign of terror and physical destruction.[42]

Still, available technology drove tactics and challenged the meaning of "proportionate." The euphemisms used to describe the tactics mask the reality that civilians were deliberately targeted as a means of inducing terror. Curiously, the strategic plan did not concentrate on destroying fuel and food supplies, nor the internal transportation systems that fed the industrial war machine. The official survey of the impact of strategic bombing did not evaluate the effectiveness of the attacks on urban areas but did speculate that destruction of the rail system might have brought about an earlier decision to surrender.[43] Robert McNamara, in a retrospective evaluation, summarized General LeMay's thoughts:[44]

> He noted that "If we'd lost the war, we'd all have been prosecuted as war criminals." And I think he's right. He—and I'd say, I—were behaving as war criminals. LeMay recognized that what he was doing would be thought immoral if his side had lost. But what makes it immoral if you lose and moral if you win?

As many military historians have noted over the years, the answer is that victors write the history and decide what actions were justifiable. World War II made massacre from the air a routine operation. The advent of thermonuclear weapons would see the numbers of potential civilian victims take a quantum leap.

POST WORLD WAR II

After World War II, the 1949 Geneva Conventions and PA-I dealt with some medical/humanitarian issues but did not tackle the issues raised by bombing policies in the war. Nonetheless, the emerging law and custom did address four questions: Where may air operations be conducted? Who and what may be attacked? How must operations be conducted? And what weapons may be used? Rather than engage in a detailed discussion, the following will give short answers to each.

First, to the question of where, the answer is over territory of any of the belligerent states and in international air space. Belligerents may take action to control the flight of civilian aircraft in the immediate area of operations.

Second, the principles of distinction and proportionality apply in that at all times any attack must distinguish between civilian and military personnel and objectives and must minimize "collateral damage." The ICRC commentary notes that military objectives comprise "all objects directly used by the armed forces."[45] Questions and controversy surround those targets that may contribute to a military effort or a *war-sustaining* activity. War-sustaining activities are those, primarily economic in nature, that do not have a direct connection to belligerent action but ultimately make such operations possible.[46] In terms of assessing proportionality, Schmitt notes a simple fact that at base calls into question whether proportionality matters or not: "Air weapons may lack the precision of their land counterparts, often have greater blast and radius of effects, and sometimes launched when the situation on the ground lacks clarity."[47]

Third, the law prohibits indiscriminate attacks or those not directed at a military objective, and as noted above, legitimate attacks must observe the rule of proportionality. Those who plan must "do everything feasible to verify that the target is a lawful one."[48] Again, the definition of "feasible" leaves much to the discretion of individual commanders.

Fourth, belligerents may not use weapons that cannot be directed at a specific target or that have uncontrollable effects or those that cause unnecessary suffering or superfluous injury to combatants. Schmitt identifies three categories: air-delivered land mines, incendiary weapons, and cluster munitions.[49] Additionally, unmanned drones have become another contentious aerial weapon, even though presumably they are subject to the same rules as manned aircraft.[50]

Enter the ICBM

As the Cold War rivalry became more intense, the United States built up the Strategic Air Command based on long-range bombers that could reach high-value targets in the Soviet Union with nuclear weapons. The "New Look" at American military strength was based on the idea that the United States could substantially reduce the size of its conventional military forces by placing primary reliance on nuclear weapons in the event of war. The period from 1954 to 1956 saw a significant increase in capability with the phasing out of propeller-driven B-29 and B-50 bombers and the assignment of the first giant eight-jet B-52s to operational squadrons. The U.S. nuclear stockpile also expanded dramatically. Although the exact numbers of weapons remain classified, a graph released by the Department of Energy suggests that the size of the stockpile approximately doubled between July 1953 and July 1955.[51]

The Pentagon had developed a list of objectives if nuclear war occurred: the blunting of Soviet capability to deliver an atomic offensive against the United States and its allies; the disruption of the vital elements of the Soviet war-making capacity; and the retardation of Soviet advances into Western Eurasia. The Strategic Air Command operational plan focused on the first two objectives because, based on his World War II experience, General LeMay had never believed that SAC forces should be used for attacks on battlefield targets.[52] Strategy was centered on a massive strike with the bombers getting in and out as quickly as possible, described as a "bomb as you go" system. The plan called for an intensive, tightly coordinated operation that would, in W. B. Moore's words, leave the Soviet Union "a smoking, radiating ruin at the end of two hours."[53] Moreover, if individual weapons were to be used against multiple targets, and if the entire offensive was to be delivered within a matter of hours, the time priority assigned by the Joint Chiefs of Staff to blunting and retardation as well as the differentiation between classes of targets became somewhat irrelevant.

While the United States continued to develop an intercontinental bomber capability, the Soviet Union concentrated more on missile technology. Sputnik, the first successful orbiting satellite, launched in 1957, came as a rude shock to those who had consistently denigrated Soviet technical capabilities, primarily on a perception of the poor quality of consumer products available to Soviet citizens. Putting a satellite in orbit demanded more than a rocket powerful enough to reach the appropriate height above the atmosphere. The technical issue involved developing a guidance system that could hit a precise balance point so that the satellite would not spin off into space or be drawn back down to earth. A joke circulating at the time claimed that it meant the captured German scientists who elected to work for the Soviets after the war were better than our captured German scientists.

The event spurred an arms race that eventually resulted in the development of a large arsenal on both sides. But initially the Soviets failed to exploit their advantage, leading to the 1962 Cuban Missile Crisis in which the U.S.S.R. attempted to position missiles in Cuba to offset their failure to build sufficient numbers of intercontinental ballistic missiles (ICBMs) to match U.S. production. The Soviet buildup after resolution of the crisis eventually led the United States and the U.S.S.R. to pursue limits on deployment in the Strategic Arms Limitation Talks (SALT I and SALT II). The issue of the legality of nuclear weapons would be brought before the International Court of Justice for an advisory opinion in 1996 (see chapter 9).[54]

KOREA

The air battle for South Korea was considered a crucial success for the UN forces. Attaining air superiority over both the North Koreans and the Chinese let UN airmen concentrate efforts on attacking the North Koreans on the ground, and in the process inflicted significant casualties. Curtis LeMay said of Korean War air operations:[55]

> Right at the start of the war, unofficially I slipped a message in under the carpet in the Pentagon that we ought to turn SAC loose with incendiaries on some North Korean towns. The answer came back, under the carpet again, that there would be too many civilian casualties; we couldn't do anything like that. So we went over there and fought the war and eventually burned down every town in North Korea anyway, some way or another, and some in South Korea, too. We even burned down Pusan—an accident, but we burned it down anyway . . . Over a period of three years or so, we killed off—what twenty percent of the population of Korea as direct casualties of war, or from starvation and exposure?

This differs markedly from the evaluation of Robert Futrell, who concluded that "despite . . . efforts to make the bombing raid as humane as possible, Communist propaganda exploited the attacks to the utmost. The Russian representative to the United Nations charged that the United States was conducting inhumane and indiscriminate bombing attacks against peaceful towns and civilians."[56] While the Russian accusation clearly reflected the developing rivalry of the Cold War, it does not fall far from the truth.

Not unexpectedly, the targets identified typified the bombing operations of World War II: the electric power grid, military command posts, and major infrastructure. The campaign quickly knocked out 90 percent of the North Korean power generation capacity, but international protests over the bombing of nonmilitary targets questioned the legitimacy of the raids. While this did considerable damage to the North Korean economy, it certainly did not put pressure on the Chinese or the Soviets because those targets were off-limits given the strategic goal of keeping the war limited.[57] In 1953, the United States began raids against the system of irrigation dams that controlled water necessary for rice production in a strategy that aimed to starve North Korea into submission. Again, a firestorm of international outrage limited the operation. Although the Air Force (USAF) boldly claimed that the raids were a major factor in forcing a settlement, the issue remained moot.[58]

VIETNAM

Questions that relate to the application of international law to the *ius ad bellum* with respect to the Vietnam conflict rely on how one characterizes the war and the United States's role in it. Traditional tests to distinguish between a noninternational armed conflict and an international armed conflict proved inadequate to provide definitive guidance. As a country divided (presumably temporarily) with both parts claiming sovereign status with recognition from other states, the conflict had an internal civil war and evidence of invasion by regular troops from North Vietnam. Foreign forces presumably had been invited by the South Vietnamese government to protect the sovereignty of South Vietnam. Moreover, as in contemporary conflicts in the Middle East and elsewhere, the principle of distinction becomes difficult to apply because enemy combatants did not follow the requirements of IHL—carrying arms openly, wearing distinct insignia, and so on—that enables those engaged to separate legitimate combatants from civilians.[59]

Wayne Thompson claims that the American air war in Southeast Asia was the "most extravagant ever waged. Nonetheless, the questions about the strategic effectiveness of such air operations against third world countries would again surface. The eight million tons of bombs dwarfed even the avalanche that flattened the cities of Germany and Japan in the Second World War."[60] With regard to air operations in Vietnam, the United States used three sets of bases: bases in South Vietnam (e.g., Danang); carriers based in waters off of North Vietnam; and facilities in Thailand, Guam, and other islands from which the B-52 bombers flew. At the start of the bombing campaign against the North, President Johnson opted for restraint and caution. He had inherited the war with the North based on the premise that the North Vietnamese government had committed aggression against the South. He wanted to make sure that onlookers felt that America held the high moral ground. This would be lost if observers believed that indiscriminate raids on the North had resulted in huge losses of civilian life. On the other hand, North Vietnam had little manufacturing and depended on imports of oil, weapons, and other supplies from their Communist allies.[61] The bombing of North Vietnam was carried out primarily by the Navy (USN) operating from carriers off the coast.

As it became clear that the bombing of military targets had not crippled the ability of the North Vietnamese government to supply the National Liberation Front (Viet Cong), President Johnson increased the number of targets that could be bombed to include bridges, rail lines, and other communication systems. Napalm became an intrinsic element of U.S. military action as the United States increasingly employed it for tactical and psychological effects. Reportedly about 388,000 tons of U.S. napalm bombs were dropped in the region between 1963 and 1973.[62] When it became clear that the extended target list had not produced the projected decrease in the ability of the North to move supplies and men south, the United States turned to saturation bombing using B-52 bombers. The primary targets were Hanoi and Haiphong. As the bombing intensified, both became increasingly well defended. The B-52s flew at a height that made them reasonably safe from attack. They carried a variety of bombs, but the most common was high explosives, which would leave a deep crater some 30 feet across. The use of the B-52s generated controversy. Critics regarded the bombing as a wasteful and ineffective effort. In the South, they were initially used to bomb suspected Viet Cong concentrations and bases and were directed at movement of supplies along the Ho Chi Minh Trail.

Results in terms of casualties, considering the cost of each mission, were far from spectacular. Because they flew at very high altitudes, higher than antiaircraft fire could reach, the B-52s were reasonably safe. Yet this raised questions of discrimination and proportionality in terms of targets and the resulting civilian casualties. Lower-flying bombers or fighter-bombers faced increasing risk. Between 1965 and 1968, over 1,400 U.S. warplanes were shot down over North Vietnam, with many of these involved in raids on either Hanoi or Haiphong.[63] As noted in chapter 5, the POWs held in North Vietnam were almost all airmen. Chapter 5 deals with the issues connected with their treatment. In summing up the result, one analyst has argued that even though the United States destroyed perhaps as much as much as 90 percent of all the supplies the North attempted to send south, "the almost inconceivable truth was that it didn't matter." Critical provisions never fell below what American analysts calculated to be the minimum required to sustain the Communist forces.[64]

Perhaps the most controversial operation involved the use of defoliants. In mid-1961, President Ngo Dinh Diem of South Vietnam asked the United States to conduct aerial herbicide spraying in his country. In August of that year, the South Vietnamese air force initiated herbicide operations with American help. Beginning in 1962, Operation Ranch Hand used chemical spraying to destroy jungle foliage. In nine years, aircraft sprayed over 5.3 million acres of jungle with various herbicides, including the infamous Agent Orange. One commentator notes: "Results were far from satisfactory and side effects untold."[65] Chapter 8 will explore the use of chemical warfare in some detail.

Stephen Budiansky still argues that American forces achieved some remarkable technological and tactical successes even though many count Vietnam as a "loss" for the United States. As with the Spanish Civil War, Vietnam became a proving ground for innovations that would revolutionize future air operations. Side-firing, relatively slow-moving gunships proved a potent weapon in guerrilla warfare, as did the helicopter, both as means of mobility and as weapons of attack in guerilla war. Both had proved their ability under certain conditions but would be "sitting ducks" under a better armed and informed enemy. By the end of the Vietnam War, the army had lost 2,400 helicopters to antiaircraft and small-arms fire. Still, major revisions in operational doctrine would have to wait until the Vietnam generation reached top leadership positions.[66]

KOSOVO: OPERATION ALLIED FORCE, 1999

Within the amalgam of territories that Tito put together to form the former Yugoslavia, Kosovo had the status of an *autonomous province*, one of two such areas, the other being Vojvodina in the northeast. Historically, Serbia, one of the six constitutive republics, claimed a special relationship with Kosovo even though ethnic Albanians comprised perhaps as much as 80 percent of the population. In 1989, in a unilateral decree, Serbia announced the annulment of Kosovo's autonomy and began a campaign to close Albanian media outlets and to "Serbianize" Kosovo. This led to a backlash and the formation of parallel political structure to oppose the new policies. In 1996, a group called the Kosovo Liberation Army (KLA) began to attack Serbian police and what they felt were Albanian collaborators. The Serbian government characterized the KLA as a terrorist group as justification for its actions to suppress the movement. Shortly after the announcement, the Serbian army entered Kosovo and began a campaign to "liquidate" terrorism.[67]

While serving as Director of Strategic Plans and Policy in 1994, General Wesley Clark (later, the Supreme Allied Commander of Europe (SACEUR), 1997–2000) had major concerns over his staff's lack of knowledge and experience with respect to Kosovo. He arranged a fact-finding tour. In preparation he met with NATO's regional commander, Lieutenant General Marvin Covault. Covault gave a remarkably prescient evaluation of the situation, arguing, based on experience in Vietnam, that "there aren't enough targets and they don't represent any kind of center of gravity. With five days of good weather we take them all out, and we would find that the Serbs would just keep on doing whatever they were doing. Air strikes just won't be decisive."[68] At the time, Clark seemed persuaded by the argument, but later, after appointment as SACEUR in 1997, he evidently changed his mind as it became very clear that Congress would not support an action that required ground forces, leaving air strikes as the only option. Clark now argued that air power could provide the necessary pressure to force Yugoslav president Slobodan Milošević to negotiate.[69] Still, the chairman of the NATO Military Standing Committee, German general Klaus Naumann, felt that airpower alone offered no guarantee of success. After meeting with Milošević in 1999, in a PBS *Frontline* interview, Naumann noted that Milošević emphasized the importance of Kosovo, continually referring to it as "the cradle of Serbian culture and religion."[70]

In response to widespread human rights abuse by both the Serbian army and police, in late March 1998, the UN Security Council had imposed an arms embargo, warning that "failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures."[71] In late September, with evidence of little progress in the diplomatic process, the SC passed Resolution 1199, which called for a cease-fire, the withdrawal of Yugoslav forces used for "civilian repression," and the return of refugees.[72] Even with the memory of the tragedies in Bosnia and Rwanda still fresh, the Security Council deadlocked over taking further action. Threats of air strikes by NATO did perhaps generate negotiations, which produced an agreement by Milošević to withdraw Serbian troops, but they did not defuse the conflict, which by December had become a full-fledged civil war.[73]

At that point, European states, seriously alarmed over the situation, turned to NATO as an alternative to the UN plans for air strikes that had been under way for some time. Clark advocated a phased air operation that would involve a series of escalations if Milošević did not respond to parallel diplomatic offers to settle. The goal as expressed by President Clinton was solely coercive: "To demonstrate the seriousness of NATO's opposition to aggression to deter Milosevic from continuing and escalate his attacks on helpless civilians," and, if needed, "to damage the Yugoslav capacity to wage war against Kosovo by seriously diminishing its military capabilities."[74] Unfortunately, while the bombing went on, it did not affect the continuing slaughter committed by both sides in Kosovo. Not committing forces to deal with the conflict on the ground meant that the civil war continued unabated until Milošević capitulated.[75] General John Jumper commented: "Milošević was killing people while we were killing things."[76] On the positive side, William Arkin of Human Rights Watch noted that "enormous efforts, largely successful" had been made to avoid harm to civilians.[77] Estimates put civilian casualties at less than 500 while NATO suffered no casualties. Still, most American air commanders voiced the sentiment that they never wanted to fight another war like that unleashed against Yugoslavia.[78]

While many questions raised concerns about violations of the *ius in bello*, the principle question relates to the justification for NATO undertaking the intervention—that is, the *ius ad bellum*—outside of UN Security Council approval. Supporters of the bombing raids on Yugoslavia have argued that the bombing brought to an end the ethnic cleansing, war crimes, and gross violations of human rights against Kosovo's Albanian population and led to the downfall of Slobodan Milošević's government, which they saw as responsible for the violations. Critics claim the action violated basic principles of international law as well as the NATO Charter. Article 2.4 of the UN Charter essentially bans the use of force tempered only by the strictures of Articles 51 and 52 reserving the right of individual and collective self-defense to each state. For critics, NATO's function is defined by Article 5, which would limit the use of force to attacks on a member. NATO justified its actions in Kosovo under Article 4 of its charter, which allows member parties to consult together whenever a situation threatens the political independence or security of any of the parties. Because the NATO actions in Kosovo were taken after consultation with all members, were approved by a NATO vote, and were undertaken by several NATO members, NATO contends that its actions were in accordance with its charter. Some, however, argue that Article 5 of NATO's Charter restricts NATO's use of force to situations where a NATO member has been attacked. Critics of this interpretation argue that the purpose of Article 5 was to require all NATO members to respond when an attack on any NATO member occurs, not to restrict the circumstances under which NATO will choose to use force. The members of NATO did not attempt to obtain authorization for NATO's action by a Security Council resolution because they anticipated that China and Russia would block any action through their power of veto. David Wippman succinctly summarizes the critique:

> Any judgment regarding the success or desirability of NATO's intervention in Kosovo necessarily rests on unprovable assumptions. We can only speculate on what would have happened had NATO refrained from intervening. It seems probable, though, that the violence in Kosovo would have escalated, with potentially grave repercussions for the entire region.[79]

UN Secretary-General Kofi Annan supported the intervention in principle, saying "there are times when the use of force may be legitimate in the pursuit of peace," but he was still critical of the unilateral action by NATO. He argued that "The Security Council has primary responsibility for maintaining international peace and security—and this is explicitly acknowledged in the North Atlantic Treaty. Therefore, the Council should be involved in any decision to resort to the use of force."[80] As noted in earlier chapters, questions involving human rights and the evolving "Responsibility to Protect" mantra raised by human rights activists have complicated the issues. At present, "lawfare" has considerably muddied questions relating to the resort to force. This provides an answer to a question asked 45 years ago by Thomas Franck: "Who Killed Article 2.4?" of the UN Charter.[81]

SMART BOMBS, PRECISION GUIDED MISSILES, AND DRONES: GIS SYSTEMS GO TO WAR

The senior leaders of the USAF, until the late 1980s, had been totally focused on the possibility of war in Europe, dismissing the idea that guerrilla insurgencies might be the wave of the future. As noted earlier, it took a generational change in leadership and the end of the Cold War to recognize that noninternational war might be the form of the future. Whatever else had occurred, the air war over Yugoslavia demonstrated some impressive new technology. The joint direct attack munition (JDAM) solved a number of issues in that it was relatively inexpensive and could be delivered by almost any aircraft regardless of weather conditions. It employed a global positional system (GPS), which permits the pilot to download a digital map coordinate that guides the bomb on its final path to the target by comparing the position where dropped with its final destination.[82] The JDAM essentially eliminated the distinction between strategic and tactical aircraft because now a bomber flying at 30,000 feet could strike targets with great accuracy, as easily as fighter-bombers.

Unmanned drones, controlled from remote locations thousands of miles from the battlefield, have become a staple of U.S. capability in Afghanistan and in strikes against terrorists. A Hellfire missile fired from a Predator drone killed "Jihad John," the English-speaking spokesman for ISIS, in November 2015.[83] Compared to other military tools, the advantages of using drones, particularly in that they avoid direct risks to U.S. troops, clearly outweigh the costs and consequences. Moreover, the precision comes close to one shot, one kill.[84] Since 9/11, over 95 percent of all nonbattlefield targeted killings have been by drones. The remaining attacks were Joint Special Operations Command (JSOC) raids by AC-130 gunships and offshore sea- or air-launched cruise missiles.[85] As explored earlier, distance also makes killing easier. Like their brothers, manned aircraft, drones represent a perfect example of the problems of developing rules to guide the introduction of new technology.

Beginning in 2004, the U.S. government used drones under the control of the Central Intelligence Agency (CIA) to attack hundreds of targets in Northwest Pakistan. Most of these attacks targeted the Federally Administered Tribal Areas (FATA) along the Afghan border in Northwest Pakistan (Northern Warzistan).[86] The use of drones to kill suspected terrorists and militants resulted in major protests in Pakistan over civilian casualties to the point that in 2013 the United States announced new restrictions on their use. In May 2013, the Pakistani High Court in Peshawar ruled that CIA drone strikes in Pakistan were illegal, arguing that the Pakistani government must end drone strikes, using force if needed. In April 2015, the Islamabad High Court ruled that the former head of the CIA in Pakistan should be tried for murder and waging war against the country. The court also ordered that criminal charges be brought against Jonathan Banks, the former CIA station chief in Islamabad, in relation to a December 2009 attack by a U.S. drone that reportedly killed at least three people.[87] To some extent, anger at U.S. sovereignty violations is an inevitable tradeoff when conducting drone strikes. Nevertheless, in many cases, domestic anger would lessen if the United States modified its drone policy.

Because of the extreme secrecy of the program, estimates of the numbers of militant versus civilian casualties differ significantly. The U.S. government does not publish data on drone sorties, strikes, and casualties caused. Independent researchers face significant military and militant-imposed barriers to access in FATA and must rely primarily on media reports that depend largely on anonymous U.S. government and/or Pakistani military sources—each with a vested interest in under- or over-reporting civilian casualties. The Obama administration has failed to address important questions about the scope of drone strikes. For example, do legitimate targets include children, individuals attempting to rescue drone-strike victims, and the funeral processions of deceased militants? U.S. drones have reportedly targeted all three on multiple occasions.[88] Still, the CIA and other American agencies have claimed a high rate of militant killings, relying in part on a disputed estimation method that "counts all military-age males in a strike zone as combatants . . . unless there is explicit intelligence posthumously proving them innocent."[89] Despite protests against American policy, in early September 2015, the Pakistani military executed its first-ever drone strike, firing on a "terrorist compound" on domestic soil. Army officials announced that the attack in FATA, a region synonymous with terrorist strongholds, killed three suspected "high-profile" militants.[90]

Still, from a strategic perspective, it remains unclear if drone strikes are successful or sustainable. Micah Zenko says that four critical issues confront U.S. drone strike policies: (1) coordination with broader U.S. foreign-policy objectives; (2) signature strikes and civilian casualties; (3) transparency and oversight; and (4) legality.[91] A report by the International Crisis Group (ICG) evaluating the strikes argues: "Drone strikes may disrupt FATA-based militant groups' capacity to plan and execute cross-border attacks on NATO troops and to plot attacks against the U.S. homeland, but they cannot solve the fundamental problem. The ability of those groups to regroup, rearm and recruit will remain intact so long as they enjoy safe havens on Pakistani territory and efforts to incorporate FATA into the constitutional mainstream are stifled."[92] Other critics, among them former U.S. president Jimmy Carter, have said that because of the "collateral damage," drone attacks only create more terrorists. A Council of Foreign Relations report argues:

> The current trajectory of U.S. drone strike policies is unsustainable. Without reform from within, drones risk becoming an unregulated, unaccountable vehicle for states to deploy lethal force with impunity. Consequently, the United States should more fully explain and reform aspects of its policies on drone strikes in nonbattlefield settings by . . . limiting targeted killings to leaders of transnational terrorist organizations and individuals with direct involvement in past or ongoing plots against the United States and its allies; and clarifying rules of the road for drone strikes in nonbattlefield settings. Given that the United States is currently the only country—other than the United Kingdom in the traditional battlefield of Afghanistan and perhaps Israel—to use drones to attack the sovereign territory of another country, it has a unique opportunity and responsibility to engage relevant international actors and shape development of a normative framework for acceptable use of drones.[93]

Drones will remain an important component of U.S. capability, but future effectiveness will depend on the evolution of new norms to guide their use.

Interestingly, many of the arguments justifying the extensive use of robots and drones parallel those leading up to The Hague Conventions at the beginning of the 20th century—robots and drones will make war more humane because one can kill more precisely with presumably fewer incidents of collateral damage. Yet many of these arguments ignore the reality of modern war in terms of simply first identifying an enemy with confidence. The performance of machines will still depend on the quality of the information supplied by humans. The old computer adage "garbage input, garbage output" still applies. One cannot completely eliminate the human element. One can reduce human presence on the battlefield, but as noted earlier, remote control has its limitations as well.

CHAPTER 8

Weapons and Prohibitions: Chemical, Biological, and Nuclear

> With the monstrous weapons man already has, humanity is in danger of being trapped in this world by its moral adolescents . . . Man is stumbling blindly through spiritual darkness while toying with the precarious secrets of life and death.
>
> —General Omar Bradley[1]

> They left nothing untried that was within the compass of human energy.
>
> —Appian[2]

PERSPECTIVE

As noted earlier, the traditions and "rules" of warfare stem from the beliefs and culture of particular societies. The rules and traditions that have been discussed previously come primarily from the evolution of Western practice, although clearly nations outside of Europe and the United States have signed and ratified the treaties that define the rules of modern war. Two basic principles that underpin international humanitarian law apply to this discussion: the principle of distinction and the principle that one must avoid unnecessary suffering.

The majority opinion of the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, identified both principles as essential to evaluating weapons. The opinion states: "States must never make civilians the objects of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets"[3] and that "it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing such harm or uselessly aggravating their suffering."[4] Hence, when a negative evaluation and authoritative decision about the nature of weapons or types of weapons has been made with respect to either the principle of distinction or that of "unnecessary harm and suffering," they must be banned altogether. In reality, bans have been very few.

Embodying the second principle, the St. Petersburg Declaration presumably is the first modern attempt to outlaw a specific weapon. In 1863, Russian military authorities invented a bullet that exploded on contact with hard substances and whose primary object was to blow up ammunition wagons. An 1867 modification enabled the bullet to explode on contact with soft substances. The Russian government believed the modification resulted in an "inhumane" instrument of war. Unwilling to use the bullet itself or to allow another country to take advantage of it, the Russian government suggested that the use of the bullet be prohibited by international agreement. The Declaration to that effect adopted in 1868 evolved into a customary rule that prohibited the use of arms, projectiles, and material of a nature to cause unnecessary suffering.[5]

The 1899 Hague Declaration reflects the earlier St. Petersburg Declaration in that it attempted to ban weapons based on particular technical specifications, namely the construction of bullets. Declaration IV.3 states: "The Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[6] The ICRC asserts that the prohibition has become customary law. A recent study notes that, "according to available evidence, the 1899 Hague Declaration on Expanding Bullets has been consistently applied and respected from a legal point of view. Nevertheless, efforts to uphold its object and purpose has become more difficult as new technologies develop because of the complexity of the many issues at stake."[7]

For example, the phrase "superfluous injury or unnecessary suffering" requires additional criteria because it depends on a distinction between injury and suffering that is avoidable versus that which is not. This, in turn, necessitates a comparison of a particular weapon with alternative options, if they are available, and consideration of whether the alternatives would cause less suffering *and* be sufficiently effective in neutralizing enemy soldiers.[8] So what exactly defines "superfluous and unnecessary suffering?" Again, the ICJ decision in the nuclear weapons case notes that the test should be "a harm greater than that unavoidable to achieve legitimate military objectives."[9] However, the downside of this criterion implies that weapons may not be banned on the grounds of "superfluous or unnecessary suffering" merely because they cause great or even horrendous suffering or injury. As Robert Cryer notes, the fact that the effects of the use of certain weapons may be repulsive does not "in and of itself . . . render those weapons illegal."[10] Questions of proportionality might arise, but then the wild card variable of "military constraints" enters to muddy the picture. In recognition of the difficulties, LOIAC often places restrictions rather than bans, meaning that circumstances dictate when a weapon can be legally employed.[11] Interestingly, the United States is one of a handful of nations that has implemented the requirements of Article 36 of Additional Protocol I, which provides the following:[12]

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

GAS AND BUGS (CHEMICAL AND BIOLOGICAL WEAPONS)

Chemical and biological weapons (CBWs) entail consideration of both IHL principles as well as some deep-seated antipathy based on the idea of "fairness" and fear. One recent treatise on the use of chemical weapons notes that while war is a "nasty business . . . war waged with gas—with poison vapors, with clouds of toxins—holds a special horror."[13] Dying by gas or disease does not evoke a picture of a heroic struggle or an honorable death. Of course, infections and disease have always been among the worst enemies a soldier faced. In fact, in the American Civil War, almost twice as many soldiers died from infections and disease than directly from other means. In addition, the possibility that a pathogen that lacks a cure could be accidentally or deliberately released and quite literally wipe out the human race always lurks as a very real possibility. Of course, the fear has a triple source—fear of the pathogens and chemicals themselves, fear of what an enemy possessing them might do or accidentally initiate, and fear of a terrorist attack using either. The competitive nature of the Cold War meant that both the United States and U.S.S.R. built up large stocks of chemical and biological weapons.

Chemical weapons (CWs) involve combining elements to construct a poison that will kill, injure, or incapacitate combatants. The possibility of developing CWs evolved from agricultural research aimed at developing pesticides and fertilizers. Many of the chemicals used by home gardeners and pest control companies (malathion, for example) belong to structural families that also house their more potent military brothers. One analyst has called pesticide products that claim to be "safe for human use" technical nonsense because of their toxicity if improperly used.[14]

Biological weapons (BWs) are made from pathogens—living organisms or substances that cause disease. The border between chemical and biological is not absolute. Ricin, extracted from distillation of the castor bean, could also be considered a chemical weapon. Note that the goal of utilizing either of these weapon types does not necessarily imply death on battlefields, although the goal of terrorists might entail causing as many deaths as possible. In wartime, incapacitation and confusion can result from an unexpected chemical or biological attack as well as producing a situation where an enemy has to deal with the management and resource problems associated with caring for those injured in the attack. Crops, water supplies, and animals could also form important targets. Critical questions about effectiveness on the battlefield relate to lethality (how deadly), toxicity (how much), speed (how quick), and persistence (how long effective). The number of states that have or are attempting to develop CBW capability has dramatically increased in the last 25 years. So have nonstate organizations, such as religious factions (Aum Shinrikyo), terrorist organizations, and individuals, who have their own grievances and agendas. Because CBWs are most effective against fixed positions, modern mobile warfare has relegated CBWs to the bottom of the list of preferences for most battlefield situations. Still, one might see a use for certain agents, such as tear gas and other chemical weapons that temporarily incapacitate. Essentially, all agents act either through absorption in the lungs by inhaling or through the skin.[15]

During the last century, more than 500 million people died from infectious diseases. Several tens of thousands of these deaths occurred because of the deliberate release of pathogens or toxins, mostly by the Japanese during their attacks on China during the Second World War. As our knowledge of the biology of disease-causing agents—viruses, bacteria, and toxins—has increased, so have fears that modified pathogens could constitute devastating agents for biological warfare.[16] Most people assume that germ warfare is a modern invention, but the ancient world gives us many examples of the proposed or actual use of biological weapons on the battlefield. Ancient Greek and Roman historians document many examples of both chemical and biological warfare. Note that Achilles, wounded in the heel, died of a poisoned arrow in the Trojan War. Scythian archers used arrows dipped in blood and manure or decomposing bodies in 400 BC. Their weaponry and tactics permitted them to resist conquest for four centuries. At the battle of Eurymedon in 190 BC, to offset a numerical disadvantage in ships, Hannibal hurled venomous snakes in pottery at the enemy ships of Pergamus.[17] The Chinese used arsenical smoke as early as 1000 BC. Solon of Athens put hellebore roots in the drinking water of Kirrha in 600 BC. In 429 and 424 BC, the Spartans and their allies used noxious smoke and flame against Athenian-allied cities during the Peloponnesian War.[18]

The use of dead bodies as the carriers of the biological agents proved particularly effective against an enemy's water supply. Barbarossa used this tactic at the battle of Tortona in 1155. The Mongol leader De Mussis catapulted bubonic-plague–infected bodies into Caffa in 1346. The Spanish tried wine infected with leprosy patients' blood against the French near Naples in 1495. In 1650, a unique attempt at biological warfare was utilized by a Polish artillery general, Casimir Siemenowicz, who put saliva from rabid dogs into hollow spheres for firing against his enemies. The Russians cast plague-infected bodies into Swedish-held Reval, Estonia, in 1710. However, the proposed use of BWs was not limited to Europe and Asia. In 1763, during Pontiac's Rebellion in New England, Colonel Henry Bouquet, a British officer, proposed giving the Indians at Fort Pitt, Pennsylvania, blankets infected with smallpox. Whether purposely disseminated or not, the disease proved devastating to the Native American population. Tunisian Muslims used a similar plan in 1785 by throwing plague-infected clothing into La Calle, then held by Christians.[19]

Chemical Weapons

Types of chemical weapons fall into the following categories:

1. Choking gases (chlorine, phosgene)
2. Blister agents/vesicants (mustard/sulfur, Lewsite, VX)
3. Blood agents (hydrogen cyanide, cyanogen)
4. Nerve agents (sarin, VE, VX, VG, VM, VX)
5. Incapacitants, harassing/riot control agents, and vomiting agents

World War I CWs consisted primarily of choking gases. For several practical reasons, militaries have moved away from choking gases. They have a strong odor that can give potential victims a chance to prepare or evacuate, they dissipate quickly, and they require relatively high levels of concentration for effectiveness.[20] Blister agents (mustard gas) were used late in World War I and in the Iran-Iraq war (1980–1988). Nerve agents are the most lethal. Odorless and colorless, nerve agents work the quickest through inhalation but can also be absorbed through the skin into the bloodstream.[21] Prior to the development of nerve agents, CWs were viewed as a tactical approach to gaining the upper hand over the enemy on a localized battlefield. The creation of nerve agents that have high toxicity and speed of action has made attacks on the civilian population causing large numbers of casualties a possibility.

In 1854, Lyon Playfair, a British chemist, proposed a cyanide artillery shell for use primarily against enemy ships as a means of breaking a stalemate. The British Ordnance Department rejected the proposal as "bad a mode of warfare as poisoning the wells of the enemy." Playfair's response offered a rationalization, which was used to justify the use of chemical warfare into the next century:

> There was no sense in this objection. It is considered a legitimate mode of warfare to fill shells with molten metal which scatters among the enemy, and produced

> the most frightful modes of death. Why a poisonous vapor which would kill men without suffering is to be considered illegitimate warfare is incomprehensible. War is destruction, and the more destructive it can be made with the least suffering the sooner will be ended that barbarous method of protecting national rights.[22]

Bringing Playfair's surmise to reality entailed the evolution and fabrication of large quantities of both weapons and delivery systems, which required the development of modern organic chemistry.

Although countermining smoke was used by the South during the American Civil War (1860–1865), historians agree that the first modern use of chemical weapons occurred in World War I. At first the chief of the German General Staff, Erich von Falkenhayn, opposed the use of gas as "unchivalrous," but the prospect that CWs could quickly bring a resolution of the war changed his mind.[23] After the war, revulsion over the use of chemical weapons was so allegedly widespread that even General John Pershing, commander of the American Expeditionary Force in the First World War and the man responsible for establishing the first gas warfare unit in the American military, voiced what has become the conventional wisdom regarding chemical warfare when he stated in a 1922 report that "chemical warfare should be abolished among nations, as abhorrent to civilization. It is a cruel, unfair and improper use of science. It is fraught with the gravest danger to noncombatants and demoralizes the better instincts of humanity."[24] In reaction to the use of gas in World War I, the Versailles Treaty and the other peace agreements at the end of the war all contained articles referring to the prohibition of poison gas as a legitimate weapon of war. The Geneva Protocol of 1925 prohibited the future use of both chemical and bacteriological weapons.[25] At the time, 28 states ratified the original. While the United States signed the original treaty, it did not ratify it until 1975. Today the treaty has 138 states parties.

Nonetheless, many states had no such qualms. Spain and France used gas in the Rif War before the treaty came into effect. The Rif War (also known as the Second Moroccan War) between the colonial power Spain, later joined by France, and the Berbers of the Rif mountainous region occurred in 1924–1926. Ironically, France served as the state accepting ratifications for the 1925 Geneva Protocol, although the war ended before the treaty went into effect in 1928.[26] In 1928, Japan began producing CWs and used them to help quell a tribal rebellion in Taiwan in 1930.[27] Japan also used CWs against unprotected Chinese troops in the Sino-Japanese War (1937–1942; see chapter 7). Extant records indicate that Japanese troops carried out 1,059 chemical attacks.[28] A Chinese general said: "Even when it is only tear or mustard gas, it lays our men out for long enough to enable the enemy to come and bayonet them as they lie gasping for breath."[29] Italy used mustard gas in its Ethiopian invasion (1935–1936). Analysts attributed Italy's quick conquest to the use of gas, noting that it reduced "the total sufferings and loss of life. If the war had been prolonged to the following year, the advance to and capture of Addis Ababa would almost certainly have entailed heavy fighting and this would inevitably have caused considerable casualties to the Italian forces."[30]

Most historians also agree that apart from Japan, no state employed chemical weapons in the Second World War, even though many states had stored large stocks. Historians cite four main reasons for restraint: (1) mutual deterrence—both sides warned that any use of chemical weapons would result in strong retaliatory use of chemical weapons; (2) a general public abhorrence at the thought of using gas; (3) the influence of the 1925 Geneva Protocol; and (4) the lack of training by various militaries in the tactical use of chemical weapons.[31] President Franklin Roosevelt was vehemently opposed to chemical warfare, stating that the use of chemical weapons was "inhuman and contrary to what modern civilization should stand for."[32] Nonetheless, General George C. Marshal considered the use of gas as a means of reducing casualties in the deadly island-hopping war in the Pacific. Even Adolf Hitler, the leader of Nazi Germany, who had no compunction in using chemicals to perform mass murder on civilians, initially refused to engage in chemical warfare against the Allies, although he did consider using them as a last desperate measure at the end of the war.[33] Interestingly, Winston Churchill had championed the use of gas in WWI, and again threatened deadly retaliation against German cities if they used gas on the eastern front against Soviet troops. In 1919, as secretary of war, he sanctioned the use of chemical weapons against the Bolsheviks during the British intervention in Russia.[34]

Despite allegations by the North Koreans and Chinese that the United States used chemical weapons in Korea, they never produced credible evidence to support their claims. Egypt used CWs during its military intervention in Yemen (1963–1967). As noted in chapter 7, in Vietnam, the United States used defoliants, including the infamous Agent Orange as well as CS (tear gas). Claims that the United States had used sarin in the cover Operation Tailwind proved unfounded after considerable investigation by independent agencies. In the Iran-Iraq War (1980–1988), Iraq employed chemical warfare as both a battlefield and terror weapon against civilian targets.[35] Despite the fact that Iraqi tactics improved markedly over the course of the war as they evolved a relatively sophisticated tactical package that included simultaneous delivery of nonpersistent nerve gas on forward positions and the more persistent mustard compound on rear logistical areas, Iran eventually prevailed. Eric Croddy notes that CW still only accounted for some 3 to 5 percent of Iran's casualties during the eight-year war.[36] Perhaps the most notorious use of CW agents occurred in 1988 when Saddam Hussein used them against the Kurds in Halabja in 1988.

Chemical Weapons Convention 1993

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction aimed to eliminate an entire category of weapons of mass destruction (WMD) by prohibiting the development, production, acquisition, stockpiling, retention, transfer, or use of chemical weapons. States parties, in turn, had to take the steps necessary to enforce that prohibition in respect to persons (natural or legal) within their jurisdiction. States parties agreed to destroy any stockpiles of chemical weapons they held and any facilities that produced them, as well as any chemical weapons they had abandoned on the territory of other states parties in the past. States parties have also agreed to create a verification regime for certain toxic chemicals and their precursors in order to ensure that such chemicals are only used for purposes not prohibited. As of August 2016, 192 states have ratified the treaty.[37]

With the entry into force of the convention, the Organization for the Prohibition of Chemical Weapons (OPCW) immediately began work to implement its provisions. Accordingly, the OPCW list the obligations of states as follows. Each country that belongs to the OPCW must:

- destroy all chemical weapons it owns or possesses;
- destroy all chemical weapons it may have abandoned in another country; and
- destroy facilities it owns or possesses which were involved in the production of chemical weapons.[38]

Both the convention and its implementing body are intended to adapt not only to shifts in the international environment and the changing needs of states parties but also to respond to the rapid pace of scientific and technological developments. As with a number of international organizations, monetary issues have constrained the operations of the OPCW.

Biological Weapons

Biological weapons might be the most insidious, malevolent form of warfare because they literally constitute a form of attack that has no effective defensive countermeasures other than deterrence/prevention. Whether targeted against humans, animals, or crops, they are intended to spread an infectious disease or diseases. Biological weapons create conditions that panic most people. Just consider the public concern over the possible pandemic effects of bird flu, SARS, Ebola, or AIDS as an expression of how deeply seated is the fear among the general populace of an uncontrollable epidemic. The Spanish influenza epidemic in 1918 killed an estimated 20 to 50 million people worldwide. To illustrate contemporary fears, in response to an outbreak of Ebola cases in West Africa and the Zika virus in South America and the Caribbean, a visit to any doctor's office in the United States now requires an answer to the question, "Have you been in out of the United States in the past month?" as a practical precautionary measure.

Contemporary fears stem from fear of a terrorist attack using BWs, rather than from battlefield use. At least 17 countries still have bio-weapons programs. Croddy argues that like nuclear weapons, CBWs have a terrifying effect because they exist as potential threats, and because they have not been widely used, we can only guess at their effects in real battle or in widespread terrorist attacks. Lack of experience produces feelings of unease.[39] Indeed, in comparison with other means, gas and bugs have rarely been used. Japan, Rhodesia, and South Africa have used biologic agents, but against enemies who could not respond in kind. The fear of retaliation may serve as the most effective deterrent against first use.

A recent study noted that in terms of the thousands of pathogens and toxins that occur naturally, only 160 of these have the capacity to do harm to humans. Of these, about 30 could possibly be "weaponized"—that is, developed into potential agents for widespread use. Yet, preventing proliferation of biological weapons is one of the primary security goals in the 21st century. Despite the potential threat, the possibilities have not generated a cornucopia of research findings. Additionally, because of the history of use, the focus has been on chemical weapons. The good news here is that developing an effective delivery system limits the potential for large-scale use. Moreover, keeping the stock alive long enough for an attack also represents a major challenge.[40]

Essentially, biological weapons use living organisms or biologically produced toxins to injure or kill humans, animals, or crops.[41] They are often characterized as "the poor man's atomic bomb"—that is, a weapon of mass destruction—because of their potentially uncontrollable effects and comparatively inexpensive cost to develop and build. Still, because of the secrecy of most programs, biological weapons are not effective strategic deterrents. Secrecy makes it difficult to make credible threats, and because of their unpredictability, the effects of biological weapons makes relying on them as a deterrent much less creditable as a retaliatory threat.

BW agents include anthrax, plague, tularemia, glanders, Q-fever, cholera, smallpox, various hemorrhagic fever viruses, botulism, staphylococcus, and ricin.[42] The principle goal of BW employment on the battlefield, however, is primarily to incapacitate, not necessarily to kill. For example, many agents, such as the Venezuelan equine encephalitis virus or Q-fever, were developed by the United States and U.S.S.R. because of their high infectivity, not because of their lethality. However, other agents, certain strains of anthrax for example, are so virulent that a U.S. Army handbook for clinicians asserted that the sudden and unexpected death of the patient might be the first clue to a correct diagnosis. Under the right weather conditions, BW agents have a much larger potential "footprint" than CWs.[43] Gregory Koblentz argues that three factors may influence future decisions about using BWs: BWs strongly favor the attacker; they serve well as force multipliers; and concerns about their use seems to be eroding.[44]

Biological weapons suitable for "weaponizing" share one or more of the following characteristics:[45]

- the ability to infect in small doses
- high virulence, that is the capacity to cause acute illness
- ability to remain potent during storage, transportation
- ability to be produced in large quantities
- ease of dissemination and ability to survive environmental stresses

The Biological and Toxin Weapons Convention (BTWC, 1972) entered into force in March 1975. Currently it has 165 states parties with 12 additional signatory countries who have not yet deposited instruments of ratification. Only four pages long, the convention has no provisions for verification or for monitoring compliance. When it was negotiated in the early 1970s, there was a perception that biological weapons had little military utility, although previous biological weapons had demonstrated, by all means short of actual use, their potential effectiveness. The treaty reiterated the 1925 prohibition on use and sought to end the research and stockpiling of weapons. The BTWC bans the development, stockpiling, acquisition, retention, and production of:

1. Biological agents and toxins "of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes"
2. Weapons, equipment, and delivery vehicles "designed to use such agents or toxins for hostile purposes or in armed conflict"
3. Any transfer of or assistance with acquiring the agents, toxins, weapons, equipment, and delivery vehicles described above[46]

The convention further requires states parties to destroy or divert to peaceful purposes the "agents, toxins, weapons, equipment, and means of delivery" described above within nine months of the convention's entry into force. As a disarmament instrument, technically the treaty is not part of the law of armed conflict, but it applies because of its close relationships with the 1925 Geneva Protocol.

Detection and Disposal

Currently the problems for both CWs and BWs revolve around two issues: detection and disposal. Both are difficult and expensive. Detecting and monitoring the production of biological agents raises very complex issues. The production of biological agents can be mixed in with legitimate research and production of vaccines for other diseases and as such would be effectively hidden unless one had inside knowledge. The experience of the United Nations Special Committee (UNSCOM) in verifying Iraq's biological weapons program from 1991 to 1998 (and its dismantling), and the Soviet Union's highly secretive biological weapons program from the mid-1980s into the 1990s, illustrate how difficult it is to oversee, gather intelligence about, and verify the production of biological agents, whether in governmental or private entities.[47]

The Cold War accelerated research and production of both chemical and biological weapons. From World War I until 1968, the United States produced nearly 40,000 tons of chemical weapons. From 1967 to 1970, the U.S. Army disposed of thousands of chemical warfare agents and ammunition into the sea as part of Operation Cut Holes and Sink 'Em. However, in 1972, Congress passed the Marine Protection, Research and Sanctuaries Act, which prohibited this kind of dumping. In 1997, the United States ratified the Chemical Weapons Convention Treaty and agreed to destroy all of its chemical weapons by April 29, 2012. At that date, it had destroyed 90 percent of its stockpile. Early in 2015, it began disposal of the remaining weapons stored in facilities in Pueblo, Colorado, and Richmond, Kentucky.[48]

Anticipating U.S. ratification of the 1972 Biological Weapons Convention, President Richard Nixon ordered the termination of the U.S. offensive biological weapons program by executive order. The United States officially adopted a policy to never use biological weapons, including toxins, under any circumstances. National Security Decisions 35 and 44, issued during November 1969 (microorganisms) and February 1970 (toxins), mandated the cessation of offensive biological research and production and the destruction of the biological arsenal. Research efforts were redirected to the development of defensive measures, such as diagnostic tests, vaccines, and therapies for potential BW threats. Stocks of pathogens and the entire biological arsenal were destroyed between May 1971 and February 1973 under the auspices of the U.S. Department of Agriculture; the Department of Health, Education, and Welfare; and the Departments of Natural Resources of Arkansas, Colorado, and Maryland. Small quantities of some pathogens were retained at Fort Detrick to test the efficacy of investigational preventive measures and therapies.[49]

Factors influencing the decision to terminate the offensive biological program included pragmatic as well as moral and ethical considerations. Given the available conventional, chemical, and nuclear weapons, the military did not consider biological weapons as essential for national security. The potential effects of BWs on military and civilian populations remained conjectural because, for obvious ethical and public health reasons, they cannot be empirically studied. Hence, biological weapons were considered untried, unpredictable, and potentially hazardous for the users as well for those under attack. Moreover, the United States had never trained troops to use (or respond to) a bio-weapons attack. Field commanders and troops were totally unfamiliar with their use.

In 2001, at approximately 40,000 metric tons, Russia's declared chemical stockpile formed the world's largest cache. The weapons were stored at seven depots with 80 percent of the stockpile located at five of the sites. The stock included sarin and both thickened and nonthickened forms of soman and Russian VX.[50] More than four years after the entry into force of the Chemical Weapons Convention, which Russia has ratified, the failure to begin destruction of the vast chemical weapons stockpile it inherited from the Soviet Union is a matter of growing international concern. Because a key objective of the convention is to eliminate existing stocks of chemical weapons, the fact that Russia has already missed the first destruction milestone specified in the treaty and is certain to miss the second threatens the credibility of the chemical disarmament regime.[51] While the 40,000 tons of CWs are stored in officially declared military depots, thousands of others lie in abandoned and uncharted weapons dumps, posing a huge threat to the surrounding environment as they age and break down. The Russian military, which created these undeclared dumps decades ago, still denies that they exist. In terms of disposal, the *Washington Post* called abandoned bombs a visible symbol of a Russian chemical weapons nightmare, noting the extreme difficulty in destroying them but emphasizing the greater problem of even finding them all.[52]

The same hazards apply to the disposal of Russian biological weapons. The Soviet Union built a major research and testing facility on Vozrozhdeniya (Renaissance/Rebirth) Island in the Aral Sea. When the site was closed in 1991, many of the containers holding the spores were not properly stored or destroyed, and over the last decade many of these containers have developed leaks. At present, the northern part of the island, which Kazakhs call Mergensay, is on Kazakhstani territory. The southern two-thirds of the island is in the Karakalpak autonomous region of Uzbekistan. Because of diversion of the rivers that feed the sea for agricultural purposes, the Aral, once the fourth-largest inland sea, has lost over half its surface area since 1960 and continues to shrink. As the Aral Sea evaporates, the environmental damage from leaking containers has spread.[53]

Poison

The prohibitions here primarily deal with the pollution of drinking water or foodstuffs with toxic materials. They also ban the use of poisoned weapons, such as the arrow that caused the death of Achilles in *The Iliad*. The ban applies to any substance intended to aggravate a wound.[54] Article

8(2) (b.xvii) in the Statute of the International Criminal Court defines the use of poisoned weapons as a war crime.[55]

CERTAIN CONVENTIONAL WEAPONS

As examples of the difficulty in achieving total bans on specific weapons, concerns about modern small-caliber high-velocity weapons, shotguns, and other such weapons since Vietnam has produced no agreements. The difficulty in reaching an agreement on what weapons might violate the principles has resulted in a succession of treaties dealing with specific weapons. Negotiations for the "certain conventional weapons" (CCWs) began under the auspices of the ICRC, but concerns that sponsoring an arms-control treaty might conflict with the watchdog humanitarian role led to shifting venues to the United Nations. These negotiations produced the 1980 Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, which seeks to regulate the use of antipersonnel land mines, white phosphorus munitions, laser weapons, flamethrowers, cluster bombs, and improvised explosive devices.[56] The structure reflects a different strategy that parallels the approach used in environmental treaties. Rather than an all-inclusive instrument, the convention consists of a framework or foundation treaty and several separate protocols addressing specific issues. To become a member, a country must ratify the foundation treaty and two of the protocols (Article 4.3). The five protocols are:

- Protocol on Non-Detectable Fragments (Protocol I)
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II)
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)
- Protocol on Blinding Laser Weapons (Protocol IV)
- Protocol Concerning Explosive Remnants of War (Protocol V)

Protocol II and Protocol III illustrate the earlier point that setting restrictions on use has proven a more feasible approach than seeking outright bans.

In 1980, the framework treaty and Protocols I and II entered into force. Protocol I is perhaps the briefest arms convention in history. It consists of one sentence: "It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays." The principle concern here centered on the possibility of plastic-, wood-, or glass-based munitions that X-rays could not detect, thus hindering potential medical treatment. In particular, the cluster bombs used by the United States in Vietnam had generated controversy because they used plastic in the arming mechanism, which produced penetrating fragments upon detonation. Solis notes that the protocol does not apply to this weapon because it specifies that any injuries must be from a weapon whose "primary effect" comes from the prohibited substances. One commentator notes that states readily ratified this protocol because it banned a weapon that did not exist, and no state had acknowledged a program to develop one.[57] As of this writing (August 2016), Protocol I has 116 states parties.

Protocol II: Mines, Booby Traps, and Other Devices[58]

The discussion of this protocol requires a prefatory note. One should not confuse CCW Protocol II with the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997), which deals only with antipersonnel land mines.[59] Unlike Protocol II, which seeks to regulate use, the Ottawa Convention provides for a total ban on the use of antipersonnel mines. States agree to "never under any circumstances" use antipersonnel land mines or to develop, produce, transfer, or acquire them, and to destroy existing stocks. The convention currently has 162 states parties that include France, Germany, and the United Kingdom. The United States, Russian Federation, China, and Israel have neither signed nor ratified/acceded. But the United States has banned the export of antipersonnel land mines and has committed not to employ any mines that do not have self-destructing or self-deactivating mechanisms.[60]

Currently Amended Protocol II has 94 states parties, including the United States. It does not prohibit all use of mines, booby traps, and other such devices. It prohibits the use of devices that would be "undetectable" (Article 4), cause "superfluous injury or unnecessary suffering" (Article 3.2), or that would be "indiscriminate" or directed at civilians (Articles 3.3, 3.4). Again note the limitations, which do not address issues other than those raised by the principle of discrimination. The protocol basically reflects accepted military practice, but Article 1.4 does explicitly state that the protocol also applies to noninternational conflicts: "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State." The protocol covers both antipersonnel and antitank/vehicle mines, defined as devices that are placed under, on, or near to the ground "designed to be exploded" by pressure, proximity, or contact with a person or vehicle (Articles 2.1, 2.3).[61] The location, nature, quantity, and patterns of delivery of mine fields and booby traps must be recorded. This has a distinct military purpose in that protection of one's own troops and allies forms a major concern. At the end of hostilities, the parties must take all feasible measures to protect the civilian population from the dangers from mine fields and other explosive devices.[62]

While mines are explicitly designed for military purposes, booby traps are apparently harmless objects designed to kill anyone who approaches or disturbs them. As noted earlier, the basic principle of discrimination now explicitly applies to all such devices. Specifically Articles 2.2 and 2.6 of the protocol prohibit booby traps "which are in any way attached to or associated with: internationally or nationally recognized protective emblems or signs; sick, wounded or dead persons; burial or cremation sites or graves, medical facilities, transportation, equipment, or supplies; food or drink; objects of a religious nature; cultural objects; children's toys and all objects related to children; animals or their carcasses."[63] The prohibitions have been widely ignored by hostile forces in Afghanistan.[64]

Protocol III: Incendiary Weapons[65]

As Solis writes, the American use of napalm in Vietnam had elevated an already-present concern about incendiary weapons.[66] Accordingly, Protocol III has an extensive definition of incendiary weapons: "Any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat or combustion thereof, produced by a chemical action" (Article 1.1). Article 1.1(b) (i, ii) also defines what is not considered an incendiary weapon: those that have "incidental incendiary effects such as illuminants, tracers, smoke or signaling systems," or those whose primary impact "combine penetration, blast or fragmentation effect." Much to the dismay of many, the protocol does not ban napalm or any incendiary weapon, but Frits Kalshoven noted that the experts assembled to assess the issues were hopelessly divided on the question of whether the use of any incendiary weapons was permissible.[67] The protocol adds little to the existing law that applies to all weapons—the principles of distinction and prevention of unnecessary suffering. Solis cites the British manual on the law of armed conflict, which states that incendiary weapons should only be directed against "armoured vehicles, bunkers, and built-up emplacements, even though personnel inside may be burnt."[68] Currently, 112 states have ratified or deposited instruments of accession.

Protocol IV: Blinding Laser Weapons[69]

Added to the CCW in 1996, the concern stemmed primarily from the impact of large numbers of permanently blind combatants returning home. The concern can be traced back to WWI and the impact of phosgene gas attacks that resulted in permanent blindness. The protocol currently has 107 states parties. The United States ratified it in 2009. The negotiations that produced the final text illustrate the problems of assessing the impact of new technology. The "experts" again were quite divided in their opinions. The ICRC had proposed a total ban, but those who argued that lasers had considerable battlefield utility without producing any permanent blindness prevailed. While the framers clearly intended the protocol to apply to both NIACs and IACs, it does not specify a scope of coverage.

The protocol has three essential provisions:

> *Article 1*
>
> It is prohibited to employ laser weapons specifically designed, as their *sole* combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. [emphasis added]
>
> *Article 2*
>
> It is prohibited to [produce and] employ laser weapons primarily designed to blind [permanently]. In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision.
>
> *Article 3*
>
> Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.

Hence, lasers may be used against legitimate military targets, such as disabling military optical equipment, even though the result might produce "incidental" blindness in the operator.[70] It also permits the use of "dazzlers" that induce temporary blindness.

Protocol V: Explosive Remnants of War[71]

Protocol V has been accepted by 87 states. As discussed earlier in this chapter, the 1990s saw the rise of concern over the use of antipersonnel mines. Until Protocol V entered into force, few rules of international humanitarian law had been developed to minimize civilian casualties from unexploded mines and shells in the wake of a conflict. Protocol V addresses the critical problem of the failure of belligerents to deal with leftover ordnance and mines when hostilities have ended. From the standpoint of IHL advocates, the major failing of the treaty came from not being able to include a total ban on cluster munitions.[72]

Nuclear Weapons

Apart from questions relating to the existence of God, nothing has generated as much commentary as the issues generated by the advent of the Nuclear Age. In a very narrow sense, the questions relating to the production and possession of the weapons fall within the realm of arms control, not international humanitarian law, and have been treated as such by states who have developed them. The number of treaties that seek to regulate the proliferation of nuclear weapons, to restrict testing, and to limit the scope of armament provides clear evidence of concerns.[73]

From a simple review of the issues associated with chemical and biological warfare, the legality of *using* nuclear weapons would seem incontrovertible. The arguments based on the principle of limiting war in terms of the principle of distinction, as well as those that produced the agreement of limiting chemical and biological warfare, would seem to rule out the use of the weapons in most circumstances. It is indisputable that customary law imposes limitations on the use of the weapons in certain situations, but as Stephen Schwebel, the American judge on the International Court of Justice, has observed in his dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons* case:

> *More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle. It is accordingly the more important not to confuse the international law we have with the international law we need* . . . The essence of the problem is this. Fifty years of the practice of States does not debar, and to that extent supports, the legality of the threat or use of nuclear weapons in certain circumstances. At the same time, principles of international humanitarian law which antedate that practice govern the use of all weapons including nuclear weapons, and it is extraordinarily difficult to reconcile the use—at any rate, some uses—of nuclear weapons with the application of those principles . . .
>
> State practice demonstrates that nuclear weapons have been manufactured and deployed by States for some *50* years; that in that deployment inheres a threat of possible use; and that the international community, by treaty and through action of the United Nations Security Council, has, far from proscribing the threat or use of nuclear weapons in all circumstances, recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened.[74]

In sum, contemporary international law lacks any regulations that explicitly prohibit the *use* of nuclear weapons. As Stefan Oeter argues, "the claimed customary prohibition on the use of nuclear weapons is more an aspiration *de lege ferenda* founded in natural law theory and moral philosophy than a definite provision of positive customary international law derived from state practice and *opinio juris*."[75]

CHAPTER 9

Courts and Trials

> Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.
>
> —Francis Lieber[1]

WHY COURTS AND TRIALS?[2]

Given the nature of the atrocities in many contemporary armed conflicts, in what sense may we speak of appropriate punishment that will secure some rough justice? The sheer scale of crimes involving thousands upon thousands of killers can overwhelm almost any judicial system. We tend to think in terms of domestic criminal law systems where the idea is that, in some measure, the law applies penalties proportionate to the crime. Occasionally the issue of proportionality does pop up in domestic law. The arguments for and against trials have several dimensions. Arguments for a judicial process come mainly from the Western liberal legal tradition. They focus on fairness and due process and the role that bringing at least *some* of those who committed the most barbarous acts to the bar plays in terms of reconciliation. Advocates argue that prosecution of the individuals responsible for specific acts will avoid the attribution of collective guilt to an entire nation, provide victims with a sense that their grievances have been addressed, and establish an impartial historical record of the crimes and events. Ideally, successful apprehension and prosecution would also serve as a deterrent.[3]

Most ordinary war crimes are tried by domestic courts. International tribunals do not deal with ordinary war crimes. They come into play when states will not or cannot punish grave breaches. Presumably, the target would be the instigators, planners, and leaders, not the ordinary "foot soldiers."

International trials are slow and expensive. The *Tadić* trial, the first before the ICTY, cost US$20 million to convict a low-level foot soldier. Tadić was chosen as a target of opportunity—he was already in custody—not because he was necessarily otherwise important. In looking back, two fundamental questions emerge: at what cost, and to what effect? Even the staunchest of advocates acknowledge that, to have an ongoing impact, the process needs much improvement. Geoffrey Robertson concludes that the future depends on whether or not the ICC and other international courts "can overcome their *crippling failure* to work expeditiously and effectively and especially, cost effectively."[4] Consider not only the length and cost of individual trials but the length of time the entire ICTY/ICTR process has taken. Granted, much of this in terms of the early years occurred because judges, conservative by training and experience, proceeded very cautiously because they had no firm guidelines, and everyone involved knew each early case charted new ground.

Questions of cost form an area of major concern. Adhering to the ideal of fair trials has a hefty price tag. Consider the costs of maintaining the basic structure (overhead) in terms of salaries for judges, prosecutors, support staff, and facilities apart from the cost of trials. To use the ICTY as an example, apart from the 16 permanent and 12 *ad litem* judges, the bulk of the fixed cost comes from salaries and maintenance of 1,200 staff. In a 2004 statement to the UN General Assembly, Judge Theodor Meron, President of the ICTY, directly addressed the funding problems. He argued that the lack of funds threatened to undermine the body's work at a crucial time because the tribunal had to reduce staff by more than 100—about 10 percent of its strength.[5]

Add to the ongoing fixed costs those of actual trials.[6] Trials can last two years or more. Some defense costs may be reduced because since 2003 defense lawyers have been paid on a lump-sum basis, which has reduced delaying tactics because now the defense has a huge incentive to deal with cases expeditiously. The savings here, however, may be offset because the increased number of high-level defendants has produced more complex trials.[7] One must consider, in addition to fees for defense attorneys, other administrative costs related to operating in an international environment. For example, fairness demands that all have easy access to the relevant documents. To quote Erik Mose:

> The documents are all subject to disclosure and must be translated for legal teams and the accused. Translation may be required of thousands of pages into at least one official language of the Tribunal. The number of witnesses is often considerable, and interpretation of all testimony is required in three languages. Witnesses have often to be extracted from a difficult environment, afforded considerable protection before and after testimony and sometimes relocated. The staff and counsel involved in cases come from different cultures and traditions, and effective communication requires new skills and extra efforts.[8]

Moreover, as the ICTY trial of Milošević showed, if conducted under standards that meet modern ideas of "fairness," a trial can give the accused a bully pulpit to publicize their views. Finally, courts require proof adduced through application of a very strict set of rules. Such proof may not always be readily available considering the circumstances under which many atrocities have occurred.

Thresholds and Contexts[9]

Four important observations apply here. First, for IHL to apply, one must first determine that an armed conflict exists. No clear guidelines with respect to defining specific threshold conditions for international armed conflict have emerged from the practice of the ad hoc tribunals. Prosecutors have treated the issue as an evidentiary one specific to each individual case.[10]

Second, to what extent do the rules applicable to international armed conflict apply to internal armed conflict? Here we see an interesting evolution. While Geneva PA-II significantly extended the regulations applicable to noninternational armed conflict, many questioned whether the law of war crimes applied. The early 1990s witnessed an upsurge in internal conflicts. As discussed in earlier chapters, these often had severe consequences for surrounding states. In drafting the ICTR Statute, the Security Council had to deal expressly with the question of war crimes and internal armed conflict. It did so by directly incorporating Common Article 3 of the Geneva Conventions and most of the provisions of PA-II directly into the statute.[11] Shortly after, the ICTY Appeals Chamber in the *Tadić* case took the issue head-on, suggesting that a number of rules and principles (including Common Article 3) applied to internal conflicts.[12] The Rome Statute of the ICC explicitly identified and incorporated some core rules, indicating some convergence between the two regimes.

Third, distinguishing a noninternational conflict, where the rules would apply, from a riot or other relatively minor disorders remains an open question. Authorities agree that time (conflict is of a protracted nature), intensity, and level of organization are the essential criteria.[13] Many other technical questions not germane to this discussion remain. For our purposes, taking note of the questions and potential problems they raise will suffice.

Fourth, not all crimes committed during an armed conflict are war crimes. The criminal conduct must be not only within the context but associated with the conflict.[14] Ordinary crimes remain ordinary crimes to be prosecuted by local authorities if they do not meet the twin tests. To assess the nature of the crime, one must take into account the status of the perpetrator, the status of the victim, and the purpose of the act.[15]

THE GENESIS OF INTERNATIONAL COURTS

As a relatively new branch of law, international criminal law *suffers from a very high political content that produces vague definitions and virtually nonexistent provisions for enforcement.* The experience after World War I provides a good illustration of the problems. Great Britain and the other Allied

Powers pressed for war crime trials after World War I with very disappointing results.[16] The United States had little interest in the British effort to bring the kaiser and other high officials of the Central Powers (Germany and its allies) to trial. Resisting the urge to punish those deemed responsible for the war, the arguments of the U.S. delegation in opposing trials are interesting and worth noting because they illustrate both important political judgments as well as practical legal difficulties. The American delegation had three main objections:

1. The uncertainty of the law to be administered—what constituted the "laws of humanity"?
2. Heads of states were included in the proposed indictment
3. The tribunal would be constituted *ex post facto* (after the fact)—that is, those being tried would not have been subject to its jurisdiction when the offenses were allegedly committed[17]

The Japanese delegation also opposed the trials for many of the same reasons.[18]

From a legal standpoint, both the American and Japanese positions reflect what had become a basic tenet of a shared understanding of legal process, whether domestic or international: *nullum crimen, nulla poena sine praevia lege poenali*. Simply translated, the Latin maxim says there can be no crime (*nullen crimen*), and thus no penalty (*nulla poena*), without a previously existing law specifying crime and punishment (*sine praevia lege poenali*). We find this idea in Article 1.9 of the U.S. Constitution, which prohibits Congress from passing *ex post facto* (after the fact) laws. We also find this explicitly stated in the contemporary era in Article 22(1) of the Rome Statute of the International Criminal Court: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes at the time it takes place, a crime within the jurisdiction of the Court."[19]

The Japanese and American positions also rested on the premise of traditional international law that responsibility was collective, not individual. Those acting as officials of the state enjoyed immunity because of their position. The United States and Japan believed that, at the onset of WWI, *no rules of international law provided for individual criminal liability* for the resort to war. The proposed charges were totally *ex post facto*. Nonetheless, despite the American and Japanese objections, Article 227 of the Treaty of Versailles created a court of five appointed judges to try the ex-emperor of Germany for "a supreme offense against international morality and the sanctity of treaties." The trial never happened because Kaiser Wilhelm had found asylum in the Netherlands. The Dutch government refused to surrender him for trial based on their agreement with the American and Japanese interpretation of international law at the time.

War Crime Trials: World War I

Leipzig[20]

Despite problems, the pressure on Germany to try war criminals resulted in several trials of soldiers.[21] Peter Maguire notes that the German government resisted all efforts to try Hindenburg and associates on the basis that "the extradition of those blacklisted for trial by an Entente court is a physical and moral impossibility."[22] The Allied Powers also submitted to the German governments a list of 854 names of individuals alleged to have committed prosecutable offenses. In addition to Hindenburg, the list included Germany's most prominent statesmen and military leaders during WWI: Bethmann-Hollweg, Moltke, Ludendorff, Bülow, Scheer, and Tirpitz.[23] The Allies faced a problem. Unlike WWII, when they occupied a defeated Germany, the surrender in WWI did not include occupation of Germany. Even as a defeated power, the German government vigorously resisted the request.

> Needless to say, German public opinion radiated extreme hostility to the trials.
>
> Germans momentarily forgot their many antagonisms as they united to oppose Allied demands. The Germans were particularly sensitive about dishonoring the officer corps because the military tradition had such an intimate connection with the unification of Germany in the nineteenth century. In the trauma of defeat, German nationalists, to protest the image of the army had already convinced themselves of the truth of two myths: Germany bore no responsibility for the war, and the army had been "stabbed in the back." . . . Germans, with nationalistic feelings uniquely grounded in militarism, also accepted a third myth: Allied accusations of war crimes were almost all false, and the German military did not truly deserve any kind of censure.[24]

The Allies had little desire to renew hostilities in order to secure their demands.

The list of 854 was eventually reduced to 45, of which 12 actually went to trial before the German Supreme Court with charges very narrowly based on the law of war. Maguire states that the British had been careful to choose cases where the violations of the law of war were flagrant in that the infractions had been well documented on both sides.[25] In all, the tribunal heard 12 cases, resulting in five not-guilty verdicts. Only six were found guilty.[26] No individual stood trial for the act of initiating and prosecuting the war. Indeed, Hindenburg served as President of Germany from 1925 until his death in 1934.

In 1922, the Allies sent a note to Germany criticizing the trials and declaring that the sentences imposed at Leipzig would be considered null and void. France and Belgium proceeded with new measures. The French began court-martial procedures *par contumace* (in absentia). Military commissions were set up to conduct the trials. By December 1924, more than 1,200 Germans had been found guilty. James Willis notes that "pleasing public opinion was the primary purpose of these trials, but soon war crimes punishment once again became a diplomatic weapon to use against Germany."[27]

VICTOR'S JUSTICE?

The experience of WWI does not stand in isolation. Questions of politics, law, and legitimacy in terms of enforcement continue. Many characterized the Nuremberg and Tokyo trials after WWII as victor's justice because of the ad hoc (not permanent) and *post hoc* (after the fact) nature of the court and questions concerning the validity of the law the tribunals applied. These objections aside, the International Military Tribunal at Nuremberg after World War II and its counterpart in Tokyo still do stand as the pivotal moments in terms of defining international criminal law as a possibility under international law. Yet it took the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in the 1990s to validate the emergence of international criminal law as more than a collection of idealistic aspirations.

While the Leipzig trials after World War I represent an interesting event, the major progress in development occurred after World War II. In passing, we should note one other abortive effort to construct an international court in the interwar period. In 1937, states attempted to set up an international criminal court to try terrorists.[28] The convention had an interesting ratification procedure. Actually two conventions had been negotiated: the Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court. In order to ratify the criminal court convention, states had to first ratify the terrorism convention. Even though the statute required only seven ratifications to enter into force, it never received the necessary approval. The treaty never entered into force. This chapter will focus briefly on Nuremberg, Tokyo, and other immediate post-WWII tribunals, then deal with the ICTY (Yugoslavia), ICC, and the cases before the ICJ that touch on international criminal liability.

NUREMBERG AND TOKYO TRIALS

The Nuremberg trials comprised a series of trials (1945–1949) set up to prosecute prominent members of the political, military, and economic leadership of Nazi Germany. For political reasons, the Allies chose the Palace of Justice at Nuremberg, Germany. The first, and certainly the best known, of these trials was the Trial of the Major War Criminals before the International Military Tribunal from November 14, 1945, to October 1, 1946. A second set of trials of lesser war criminals was conducted under

Control Council Law No. 10 at the U.S. Nuremberg Military Tribunals (NMT). These included the Doctors' Trial and the Judges' Trial (Ministries Case) and the British Military Court (BMC). In fact, the first set of trials occurred considerably before the IMT. For example, the Belsen Trials, which dealt with those associated with the Belsen and Auschwitz concentration camps, started in September 1945.[29]

The International Military Tribunal[30]

As an exercise in international justice, Nuremberg illustrates most of the positives and negatives discussed above. Many believe that war crimes trials, no matter how carefully conducted, still represent nothing more than "victor's justice." The Soviet Union participated in the Nuremberg trials even though Stalin was responsible for an estimated *4 million deaths* of Soviet citizens and the Soviet Army had unquestionably committed a number of gross violations of the laws of war in Eastern Europe.[31] Questions arose about the tactics authorized by Allied air and naval commanders as well. At base, many questions concerned the legal basis for the trial itself and the essential "fairness" and impartiality of the procedures adopted. For all their presumed deficiencies, the Nuremberg trials, by focusing on the alleged crimes of individuals rather than on "holding Germany guilty" (collective responsibility) provided an important impetus for development of the post–World War II human rights regime as well as the rehabilitation of Germany into an ally.

The violations of the laws of war by the Axis powers and their minor allies in World War II led to demands for an effective post-war punishment of the guilty individuals. The early questions revolved around appropriate method. Britain at first opposed trials as did the United States. The governments of the United States, Britain, France, and the Soviet Union eventually concluded in the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (August 8, 1945).[32] This instrument, also known as the London Charter, provided the details for the establishment of the International Military Tribunal. The tribunal would consist of four judges, each appointed by a party to the agreement, together with four alternates similarly chosen. The conferees chose Nuremberg as the site for symbolic reasons. It was the location for an annual mass demonstration orchestrated by the Nazi Party and the location where the anti-Semitic "Nuremberg Laws" had been proclaimed in 1935.[33]

In assessing the negotiations that led to the adoption of the agreement, one should consider the enormous difficulties involved in reconciling the different legal traditions and conceptions represented by the United States and Britain on one hand (common law) and France and the Soviet Union on the other (civil law). For example, in civil law procedure, officers of the court system assemble the evidence for both sides, the court conducts the questioning of witnesses, and cross-examination by a defending counsel rarely occurs. Hearsay evidence is permitted, as are trials in absentia. Defendants do not have a right to testify on their own behalf. In contrast, American and British procedures rely on examination and cross-examination in open court as a method of establishing the facts, and defendants have a right to confront their accusers (limits the use of hearsay evidence) and offer testimony on their own behalf. The compromise involved a blend of elements from both systems. The Anglo-American method of examination and cross-examination would be used. Because the trials would not involve juries, the Anglo-American technical rules of evidence would not apply. The court could consider any evidence it found to have probative value.[34] This included affidavits. The defendants were permitted counsel of their own choosing or could have counsel appointed by the IMT. The charter provided no right of appeal.

Article 6 of the London Charter defined the following acts as within its jurisdiction. All generated individual responsibility.

(a) Crimes against Peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or *conspiracy* for the accomplishment of any of the foregoing [emphasis added];
(b) War Crimes: Namely, violations of the laws or customs of war.
(c) Crimes against Humanity [would now be genocide].

Article 7 of the charter explicitly excluded the defense of sovereign immunity:

> The official position of defendants whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

This marked a radical departure from the U.S. position concerning the trial of the kaiser after World War I (chapter 1).

The IMT conducted 22 trials over a 10-month period. Twenty-one defendants (Martin Bormann, deputy for Nazi Party affairs, was tried in absentia) were in custody when the trials began on November 20, 1945. The defendants raised four major issues: (1) international law applies to the acts of sovereign states only, thus no basis exists for punishing individuals (*nullum crimnen*); (2) individuals cannot be held responsible for "acts of state"; (3) the law applied was *ex post facto* (*nullum crimnen*); and (4) obedience to superior orders, either political or military, was an exculpatory factor. The court handed down its judgment on September 30, 1946.[35]

Sentences were pronounced on October 1, 1946. Nineteen of the 22 defendants were found guilty. Three (Schacht, Fritzsche, and von Papen) were acquitted. Twelve were sentenced to death by hanging. Only 10 of the 12 defendants sentenced to death were executed. Hermann Göring committed suicide the night before his execution, and Martin Bormann was tried and convicted in absentia. The tribunal refused to accept accounts that claimed Bormann had died prior to the end of the war. The death sentences were carried out almost immediately on October 16, 1946.

Assessment

Do the IMT trials deserve the characterization of "victor's justice"? The short answer is, of course, yes; *but* not in the pejorative way critics use the term to mean gross unfairness. The trials stand open to critique from many different perspectives. At the time, Chief Justice of the Supreme Court Harlan Fiske Stone and Associate Justice William O. Douglas criticized both their colleague, Associate Justice Robert Jackson, who acted as prosecutor, and the proceedings as did Senator Robert A. Taft, a prominent figure in the Republican Party. Many senior Allied military commanders questioned the trials, let alone the convictions, of Raeder, Doenitz, Keitel, and Jodl. Critics argued that the proceedings had several major flaws: arbitrary and uninformed selection of defendants, biased judges, lack of due process, *ex post facto* law, and arguments of one-sidedness (*tu quoque*) in that the Allies did not punish similar crimes committed by their own forces.[36]

As a prefatory note, one must concede that in terms of procedural standards, the trials fell well short of the stringent requirements of modern Anglo-American trials, but they did conform to standards in place for continental trials. Additionally, the goals here did not include having perfect trials in terms of procedure. The purpose was to mete out a rough justice quickly and publicly. In sum, the principal purpose was more political than legal. The question is, did the flaws undermine the result? Again, the short answer is no. Seventy years after, few now argue that the trials did not result in a rough, but acceptable, justice.

The first set of issues related to having the Soviet Union participate when the Soviets had cooperated with Hitler in the partition of Poland and had later invaded Finland. Moreover, as noted above, Soviet troops had committed some serious violations of the laws of war. Finally, if the trial, according to the prosecutor Robert Jackson, aimed to set down clear lines of conduct with respect to a government's treatment of its own people, Stalin and his associates needed the lesson as well. As a matter of self-interest, the Soviets insisted that the tribunal's jurisdiction would only cover Axis war crimes and policies. In this case, power and position overrode principle.[37]

The second set of issues revolved around choosing those for trial. The Allies had decided not to prosecute the Italian Fascist leadership. However, the Italian Fascist political elite did not escape prosecution entirely. They were tried later in Italian courts. Beyond that decision, while numerous members of the Nazi inner policy-making circle had committed suicide or otherwise died, several major figures (among them Adolf Eichmann) were not included in the group chosen for the high-profile trial. Most of those accused of war crimes were dealt with by military courts of the occupying powers or were returned to the scenes of their offenses and were tried and punished by local courts and under local laws.[38] Those tried did represent influential groups within the Nazi ruling structure. In part, pragmatism played a part as well. With the exception of Bormann, all tried were in custody.

Both the constitution of the IMT and the procedure violated some fundamental standards of due process as defined in common-law adversarial systems. Critics pointed out that the judges were not impartial, the defense lacked adequate resources (including time),[39] and the Anglo-American rules of evidence were not followed. Yet the proceedings were not before a jury, and judges in *criminal* cases are not required to be impartial; they are required to be fair in judging the evidence as presented and enforcing the procedural rules impartially. Arthur Goodhart argues:

> Attractive as this argument may sound in theory, it ignores the fact that it runs counter to the administration of law in every country. If it were true then no spy could be given a legal trial, because his case is always heard by judges representing the enemy country. Yet no one has ever argued that in such cases it was necessary to call on neutral judges. The prisoner has the right to demand that his judges shall be fair, but not that they shall be neutral. As Lord Writ has pointed out, the same principle is applicable to ordinary criminal law because "a burglar cannot complain that he is being tried by a jury of honest citizens."[40]

In this case, because judges, not juries, made the decisions on the verdict, questions relating to the nature of the evidence have less validity. Unlike unschooled jurors, judges should weigh the evidence in terms of logic and consistency in a fair manner. The resource argument has no counter other than to note that in context, what would time and additional resources have produced in terms of evidence to counter the charges? To paraphrase an expression common in contracts, from a political standpoint, time was "of the essence." The defendants had a right to counsel, to a trial translated into German, to see all documents used by the prosecution, to call witnesses in defense, and to testify freely on their own behalf. Besides, at the time (and still in many cases), defendants in domestic trials often suffered from a significant deficiency of resources. Think of the person forced to use an overworked public defender as opposed to one who can afford to engage Johnnie Cochran or others of his stature.

Did the tribunal apply *ex post facto* law in violation of the *nullum crimen* principle? Crimes against humanity and crimes against peace represented two new categories of crimes. The difficulty with extant sources stemmed from the fact that no prior treaty created individual liability for violations, and no consistent practice supported the few declarations that might have suggested that certain activities created individual liability. The tribunal did consider the *ex post facto* problem at some length, finally evading the issue of validity by concluding that *nullum crimen* as a principle did not constitute an agreed principle of *international* law at that time. No defendant was convicted solely on either of these counts. All found guilty on these counts were also found guilty of complicity in war crimes, a well-established branch of international law.

While *politically* understandable because the Allies as well as the Soviet Union had also engaged in some questionable conduct, excluding *tu quoque* as a defense left an interesting gap in terms of defining what constituted a war crime. *The court never really explored in any systematic way the issue of military necessity in modern warfare.* On the Allied side, for example, some tough questions surround the decisions concerning carpet bombing as a tactic, and more specifically, the destruction of both Dresden and Nagasaki. Note that none of the indictments referenced the air war against Britain. Despite the ban on *tu quoque* arguments, the defense attorney for Doenitz and Raeder cleverly introduced a *tu quoque* argument through an assertion that unrestricted submarine warfare formed a practice sanctioned by customary international law. As evidence of this, he cited the statement of Admiral Chester W. Nimitz, commander in chief of U.S. Pacific operations, that U.S. submarines had operated under similar instructions during the war.[41] The court rejected this proposition as a matter of law, but the sentence handed down reflected the fact that it had hit a nerve. They found Raeder and Doenitz not guilty on that charge.

The flaws notwithstanding, the trials stand as a landmark in defining international criminal law. Perhaps the most important advance stems from the definition of a "crime against humanity": "an ordinary crime committed on a scale of barbarism unimaginable until the Holocaust."[42] Equally important, it established the precedent that those responsible for the policies and orders, not just lower-level "grunts" who were "just carrying out orders," bear responsibility for their actions. The mantle of "act of state"—that is, the mantle of sovereignty—would no longer give an automatic free pass for actions that so flagrantly violated basic standards of humanity. That not every defendant received the death penalty and that some were found not guilty gave the tribunal considerable credibility in terms of weighing the evidence. Questions of procedure and political expediency aside, the trials did not result in any egregious miscarriages of justice.

International Military Tribunal for the Far East (Tokyo)[43]

The International Military Tribunal for the Far East (IMTFE) formed the counterpart to the IMT at Nuremberg. Indeed, the charter setting up the trials reflected the London Charter in defining its jurisdiction as war crimes, crimes against peace, and crimes against humanity, together with a separate grouping of the crime of conspiracy to commit the foregoing crimes. Even though the course of the war in the Pacific produced instances of behavior comparable to that in Europe, the IMTFE has received far less attention than its European counterpart and has had little impact. Though influenced by the London Charter, the charter for the IMTFE did not represent the results of negotiation. It came from the Proclamation of the Supreme Commander for the Allied Powers (1946) signed by General Douglas MacArthur.[44] Although the 11 belligerents who had fought against Japan had the right to nominate judges, General MacArthur had sole authority of appointment. Judges who served came from Australia, Canada, China, Great Britain, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, and the United States. The accused faced three charges: (1) murder, (2) crimes against peace, and (3) other conventional war crimes and crimes against humanity. In all, 28 individuals were indicted and tried.[45]

Even before the beginning of the trials, controversy erupted over the decision to exempt the Japanese emperor Hirohito from trial as a war criminal. Other political decisions also limited the scope of jurisdiction. Prosecutors ignored a host of crimes committed against Koreans (including the "comfort women") as well as many prominent business leaders who had been deeply involved in the war effort. The trials began in June 1946, and the judgment was handed down on November 4, 1948. The IMTFE found all of the defendants guilty—seven were sentenced to death, 16 to life imprisonment. No defendant who received a prison sentence actually served more than 10 years.[46] In 1948, in a significant decision, the Supreme Court of the United States ruled that the tribunal was not a court of the United States and that in consequence the court had no jurisdiction to review or to set aside the tribunal's judgments.

THE *YAMASHITA* CASE—COMMAND RESPONSIBILITY

The *Yamashita* case stands out as one of the most controversial trials among a host of controversial trials. General Tomoyuki Yamashita and General Masaharu Homma were charged with failure to exert effective control over their troops.[47] The two cases raise the same issues of command responsibility. Because of the extensive controversy associated with the final Supreme Court review of the *Yamashita* case, the analysis will first focus on it.[48] After his surrender on September 3, 1945, Yamashita was charged with unlawfully disregarding his "duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes" that constituted violations of the "laws of war."[49]

No one denied the scope and nature of the atrocities that had occurred. In Nanking, Japanese troops had committed rape, torture, and murder on a massive scale against both civilians and POWs.[50] Some evidence suggested that many of the atrocities had been carried out on an organized and systematic basis on orders of Japanese noncoms and commissioned officers. The questions, however, revolved around the extent of Yamashita's culpability—what did he know, and what could he have done if he had known? General Yamashita contended that most of the atrocities were committed by units or commanders distant from his headquarters, both geographically and in the chain of command. Thus he had no knowledge of the atrocities. In its judgment, the commission accepted certain of the geographical and communications difficulties alleged by the Japanese general but concluded that these problems were not quite as insurmountable as Yamashita contended.[51] The prosecution argued that the crimes were so widespread and egregious that Yamashita had to know.[52] The commission found Yamashita guilty on all charges (December 7, 1945). It sentenced him to death by hanging. His defense team filed an immediate appeal to the Philippine Supreme Court, which rejected it on the basis that the court had no jurisdiction over the U.S. Army. The defense then sent a wire to the U.S. Supreme Court requesting a stay of execution, pending the submission of a writ of habeas corpus. The court granted the stay. Oral arguments in the case occurred on January 9, 1946.

The defense argued four issues: (1) the creation of the military commission was unlawful because hostilities had ceased; (2) the charges did not contain a violation of the law of war; (3) the commission lacked authority and jurisdiction because the rules of evidence used (permitting hearsay and other "opinion" evidence) violated both U.S. military law (due process) and the Geneva Convention;[53] and (4) the commission lacked authority and jurisdiction because of the failure to give advance notice of Yamashita's trial to the neutral power presenting the interests of Japan as required by Article 60 of the Geneva Convention. Chief Justice Harlan Fiske Stone delivered the majority opinion (6–2), upholding the legality of the commission, the verdict, and the sentence. Associate justices William Francis (Frank) Murphy and Wiley Rutledge delivered strong dissenting opinions.

Telford Taylor, who served as a prosecutor in the CCL10 trials, wrote about Vietnam: "if you were to apply to them [General Westmoreland and other U.S. generals] the same standards that were applied to General Yamashita, there would be a very strong possibility that they would come to the same end as he did."[54] However, a 1995 commentary noted:

Even in United States courts, Yamashita has lost favor. If it ever stood for a strict liability standard, that strict standard never has been enforced again. The Protocol I standard is probably the best indication of what the international community would find acceptable, and that standard rejects any strict liability.[55]

In 1948, two cases tried before the Nuremberg Military Tribunals adopted more limited liability standards for commanders. In the "hostage case,"[56] the standard shifted from "must have known" to a more lenient "should have known." This meant that a commander's knowledge of widespread atrocities was presumed but could be offset by testimony citing mitigating factors, rather than presumed as a irrefutable fact.[57] In the "high command case,"[58] another Nuremberg tribunal espoused a standard apparently giving commanders the benefit of the doubt on the knowledge issue: "Noting that modern warfare is highly decentralized, this court held that a commander cannot know everything that happens within the command, so the prosecution must prove knowledge."[59] This court found that the prosecution must prove criminal neglect in supervising subordinates to hold the commander criminally responsible for the actions of subordinates.

CONTROL COUNCIL LAW NO. 10[60]

As noted earlier, a second set of trials of lesser war criminals was conducted under Allied Control Council Law (CCL) No. 10 at the U.S. and Allied Nuremberg Military Tribunals (NMT). The United States conducted 12 trials before the NMT from December 9, 1946, to April 13, 1949. CCL No. 10 established a uniform legal basis in Germany for the prosecution of war criminals apart from those prosecuted by the IMT. By late November 1948, a total of 7,109 defendants had been arrested for war crimes, including the major cases at Nuremberg and Tokyo. The trials that took place resulted in 3,686 convictions and 924 acquittals. Of those convicted, 1,019 received death sentences, and 33 defendants committed suicide. Prison sentences were received by 2,667, and 2,499 cases were still pending. By the end of 1958, the Western Allies had convicted 5,025 Germans of war crimes, 806 being sentenced to death (486 were actually executed), and the Soviet Union had convicted around 10,000, many of whom were sentenced to 25 years in jail, and others to death. In the years since 1948, many other culprits have been discovered by their own governments (mostly in France and West Germany) and have been tried for war crimes (See Table 9.1).

THE DACHAU TRIALS (1945–1948)[61]

Another set of much less publicized trials took place in Dachau. Unlike trials under CCL No. 10, these trials were held before military commissions. These tribunals were composed entirely of American army officers.

Table 9.1
Trials under CCL No. 10

#	Trial	Defendants
1	Doctors' Trial	23 Nazi physicians of the Action T4
2	Milch Trial	Field Marshal Erhard Milch of the Luftwaffe
3	Judges' Trial	16 Nazi German "racial purity" jurists
4	Pohl Trial	Oswald Pohl and 17 SS officers
5	Flick Trial	Friedrich Flick and 5 directors of his companies
6	I G Farben Trial	directors of IG Farben, maker of Zyklon B
7	Hostages Trial	12 German generals of the Balkan Campaign
8	RuSHA Trial	14 racial cleansing and resettlement officials
9	*Einsatzgruppen* Trial	24 officers of *Einsatzgruppen*
10	Krupp Trial	12 directors of the Krupp Group
11	Ministries Trial	21 officials of Reich ministries
12	High Command Trial	14 High Command generals

Source: adapted from Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), 85–107.

Defendants had the opportunity to have legal assistance, either from a German attorney or an American group of officers with legal training.[62] Again, unlike the Nuremberg rules, which required only a majority vote, a conviction in Dachau needed a two-thirds majority vote, but this also included death sentences. The decisions of these courts had little or no written reasoning to explain verdicts. This differed from Nuremberg, where both majority and dissenting opinions were published.

During almost three years, the American military tribunals tried 1,672 German alleged war criminals in 489 separate proceedings. In total, 1,416 former members of the Nazi regime were convicted, of these, 297 received death sentences and 279 were sentenced to life in prison. All convicted prisoners were sent to War Criminals Prison #1 at Landsberg am Lech to serve their sentences or to be hanged. Two of the most highly publicized trials concerned the activities of German forces during the Battle of the Bulge in late 1944. In the Malmedy massacre trial, 73 members of the *Waffen-SS* were found guilty of summarily executing 84 American prisoners of war during the attack.[63] In another trial, former German commando Otto Skorzeny and nine officers from the Panzer Brigade 150 were found not guilty of breaching the rules of war contrary to The Hague Convention of 1907 for wearing American military uniforms in a false flag operation, Operation *Greif* (Griffin).[64]

At the end of the concentration camp trials, politics became a primary concern of General Lucius Clay, who had taken command of the European theater in the aftermath of the German surrender. By the time of the trials at Buchenwald, General Clay felt he faced an escalating crisis over the perceived fairness of the war crimes trials. To deal with accusations of mistreatment and unfairness, he established five boards of review to examine the sentences and make recommendations about confirming or amending them.[65] Clay approved almost all recommendations for reducing penalties. Two cases stood out. In the case of the *Einsatzgruppen* leaders, the trial panel had sentenced 14 of 21 to death for their murderous rampages. Only four were executed. However, the case that captured media attention was that of Ilse Koch, the "Bitch of Buchenwald." Originally sentenced to life, Clay reduced her sentence to four years. The protests led to an investigation by a U.S. Senate subcommittee. The subcommittee's final report noted that "the error in the Koch case is an isolated blemish on the vigilance and certainty of their democratic justice. Its repetition must be prevented."[66]

FROM "NEVER AGAIN" TO "AGAIN AND AGAIN"

Between the end of the trials conducted under CCL No. 10 and the events in the areas that comprised the former Yugoslavia and the genocidal outbreak in Rwanda, war crimes prosecution remained within the domain of the state. No international court existed that had the jurisdiction and mandate to try war crimes. The issues of the anticolonial movement intertwined with the bipolar politics of the Cold War to produce a climate that sustained a hard-shell conception of sovereignty that precluded overt intervention and, as a result, promoted a blindness toward the internal policies of governments that were actively persecuting their own citizens. Until the events in Yugoslavia as it began to disintegrate, the international community paid little attention to situations where massive violations of human rights had occurred. The irony stems from the fact that while human rights advocates achieved major accomplishments in terms of the evolution of an international regime that recognized the idea of universal human rights, the Idi Amins, Pol Pots, and Bokassas carried out their murderous schemes with impunity.

Yugoslavia

A country patched together after World War I, Yugoslavia had come close to disintegration during World War II when ethnic tensions resulted in mutual slaughter by Serbs and Croats in particular. In 1991, first Slovenia, then Croatia declared independence, reacting to what they perceived as an overweening Serbian ambition to dominate the federation. President Slobodan Milošević, of Serbia sought to ensure Serbian dominance in areas of Bosnia and Croatia inhabited by large Serb populations. The drive by Serbia to assert dominance and resist secession produced a number of ugly incidents that included the shelling of Dubrovnik, the devastation of Vukovar, and the massacre at Srebrenica.

The international community was extremely slow in its reaction. In October 1992, the UN Security Council voted to establish a five-member commission of experts to investigate war crimes in the former Yugoslavia. The Commission faced both financial and political problems in carrying out its task. M. Cherif Bassiouni, who served as Chair, noted that the UN did not provide sufficient funding "to insure that the Commission would not interfere with the ongoing peace negotiations."[67] It had to raise funds from other sources to fund its investigation. Bassiouni notes that the fact-finding mission "was given the broadest mandate of any Commission since Nuremberg."[68] It took full advantage of the mandate by submitting the longest report in Security Council history—3,500 pages and 300 hours of videotaped interviews and other evidence.

None of the permanent members of the SC seemed to have any great interest in bringing the issue to discussion until media reports detailing the carnage began to appear and influence public opinion. Even then, many questions remained. Diplomats working to resolve the crisis were dead set against trials because they believed the threat of prosecution would deal a severe blow to efforts to negotiate a settlement.[69] This involved an interesting irony in that many of those who might be accused of committing or condoning serious crimes were seen as necessary players in resolving the conflict. Other questions related to the authority of the Security Council to establish a court of any type given the ambiguities of its jurisdiction to deal with internal conflicts. Note that this is a separable issue from that in the *Tadić* trial, where the question became, did certain aspects of international humanitarian law apply to internal conflicts. This has to do with the interpretation of what affects *international* peace and security to the extent that Article 2.7 (domestic jurisdiction clause) does not rule out action by the Security Council.

STATUTES AND STRUCTURES: THE ICTY, ICTR, SCSL, AND ICC

The establishment of the court for Yugoslavia (ICTY) and Rwanda (ICTR) broke new ground. The United Nations had affirmed Nuremberg and its results in an *ex post* resolution, but the IMT was not its creation. The question of whether or not the Security Council had the power to create an ad hoc court was by no means clear-cut, even though Article 29 of the Charter seemingly gives the Security Council broad powers.

Only in February 1993 did the Security Council by Resolution 827 establish the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).[70] It took a year for the court to get up and running. Judges had to be elected, a site selected, facilities acquired, and rules and procedures developed and written. Not until November was a special (chief) prosecutor named.[71] Even at that point, establishment of the court seemed a token gesture. Gary Bass concludes, "NATO had the troops. In all of The Hague's early difficulties, the fundamental hurdle was the West's refusal to take military action against war criminals in ex-Yugoslavia."[72] While prosecutions began, not until 1998 did the political climate really support the tribunal. It took a courageous and principled political decision by United Kingdom Prime Minister Tony Blair to jump-start an active pursuit of those indicted. The SC established both the ICTY (Yugoslavia) and the ICTR (Rwanda), acting under its authority granted by Chapter VII of the Charter of the United Nations.[73]

In drafting the statutes, the Secretary-General accepted suggestions proposed by states, individuals, and NGOs, and drew on the experience of the IMT (Nuremberg) and the IMTFE (Tokyo). To a large extent, the draft charted new legal territory. Remember that no international criminal code existed, then or now, in the sense of a single document that defines violations in detail and specifies the necessary procedural law that would guide "fair" prosecutions. The few precedents from other national courts provided minimal guidance. Because the Security Council set up the ICTY 18 months before the ICTR, the ICTY Statute had considerable impact on the ICTR as well as on the Rome Statute of the International Criminal Court, then in development.

Yet, because they represent responses to quite different factual situations, the two statutes embody very different concerns. Rwanda was primarily an internal conflict, so a different body of law applied. When the UN Security Council established the ICTR, the preamble to the resolution authorizing the tribunal specifically voiced the concern that "genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda."[74] The statute authorized the court to try those responsible for acts of genocide and other serious violations of international law within the territory of Rwanda or Rwandan citizens who performed these acts in nearby states. As a result, almost all of the cases before the ICTR have involved charges of genocide. In contrast, very few trials before the ICTY have done so.

Unlike the ICC, these two courts are ad hoc, meaning a temporary arrangement set up to carry out a specific task, not permanent. As institutions established by the UN Security Council under Chapter VII, their existence will terminate with a decision by the SC that international peace and security have been restored in Yugoslavia and Rwanda. Both courts had a mandate to finish by 2010.[75] The arrests of Radovan Karadžić in 2008, and those of Goran Hadžić and Ratko Mladić in 2011, delayed that goal. In his report on court activities in 2014, the current President of the Court, Theodor Meron, has reassured the SC that, while various cases have suffered delays, these last cases are still expected to be completed in 2017. The deadline will be met in the sense that Hadžić died in 2014 before completion of his trial, the final verdict for Karadžić came in March 2016, and that for Mladić is expected in November 2017.[76] The Mechanism for International Criminal Tribunals (MICT) will hear the appeals for both.[77] These will not be completed until sometime in 2019, almost 25 years after initiation of the ICTY.

The ICC and the ICJ are permanent institutions whose jurisdiction and authority stem from international agreements (treaties) accepted and ratified by states. Both the ICC and ICJ (and their prosecutors) operate as independent agencies. The Security Council does not control their agendas. In theory, the ad hoc courts have an advantage in that as subsidiary organs of the SC, UN member states have an obligation to carry out any decisions that require enforcement action. In fact, as noted earlier, states have consistently ignored this obligation until it became inconvenient. Second, because the two courts depend on the SC to authorize monies for operations, they have suffered from chronic underfunding, but also because states have not paid their assessments to support the courts.[78]

Structure and Process

The ICTY and ICTR have 16 permanent judges elected by the UN General Assembly from lists prepared by the Security Council. The ICTY also has a maximum of 12 judges *ad litem* (an ad hoc judge), while the ICTR has a maximum of nine.[79] Because of the caseloads and length of trials, in order to expedite proceedings, the Security Council permitted a temporary expansion in the number of judges *ad litem* for both tribunals. Permanent judges are elected to four-year terms and stand for reelection. Judges *ad litem* also serve four-year terms but cannot stand for reelection. No two permanent judges can be of the same nationality. In composition, the courts must adequately reflect the major legal systems of the world.

The ICTY has authority to prosecute four clusters of offenses: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed in the territory of the former Yugoslavia since 1991. Unlike Nuremberg, the court has jurisdiction only over natural persons, not over organizations, political parties, administrative entities, or other legal subjects. The ICTY and national courts have concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia.[80] The ICTY can claim primacy over national courts and may take over national investigations and proceedings at any stage if it considers doing so would prove to be "in the interest of international justice."[81] In fact, the ICTY has transferred 8 cases (13 individuals) back to national courts, and the ICTR has done so with 10.

International Criminal Court

The International Criminal Court sits at The Hague and operates as an independent international organization.[82] In accordance with Article 2 of the Rome Statute, the Negotiated Relationship Agreement between the International Criminal Court and the United Nations governs the relationship.[83] The Assembly of States Parties forms the management oversight and legislative body for the court. The Assembly has a permanent Secretariat and a Bureau (interim oversight) to manage the everyday operations of the court. The court consists of 18 judges elected for 9-year terms. It is divided into 3 functional chambers or divisions: pretrial, trial, and appellate. The Appeals Division is composed of the President of the court and 4 other judges; the Trial Division consists of the Second Vice President and 5 other judges; and the Pretrial Division is headed by the first vice president and 6 other judges.[84] The other important official is the prosecutor, who heads the Office of the Prosecutor and who is also elected for a 9-year term.

Article 5 establishes the grant of subject matter jurisdiction as: "limited to the most serious crimes of concern to the international community as a whole," genocide, crimes against humanity, war crimes, and aggression. The Rome Statute, rather than referencing the relevant treaties, contains definitions of the crimes within its substantive jurisdiction listed in Article 5 within the body of the treaty. Article 5(2) had a caveat, "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." Considering the history of international efforts to define aggression, the provisions for amending the statute (seven-eighths of the Assembly of States Parties) raised serious doubts about future incorporation of this crime into the court's mandate. After two weeks of intense debate and years of preparatory work, in July 2010, the Review Conference of Rome Statute adopted by consensus amendments to the Rome Statute that include a definition of the crime of aggression and a regime establishing how the court will exercise its jurisdiction over this crime. The conditions for entry into force decided on in Kampala provide that the court will not be able to exercise its jurisdiction over the crime until after January 1, 2017, when a decision will be made by states parties to activate the jurisdiction.[85]

The *in personam* (personal) jurisdiction of the court was designed to be *complementary* to that of national courts, meaning that the ICC may only try cases where "a state is *unwilling or unable* to carry out the investigation or prosecution (Article 17.1(a))" [emphasis added]. Two further limitations on jurisdiction exist as well. The court may only seize cases where the events (or portions of the events) have occurred after July 1, 2002, when the Rome Statute entered into effect. Second, double jeopardy applies as well. The court may not try individuals if they have already been tried in another court unless the trial was considered a sham designed to absolve the person of any guilt (Article 20).

The court became a functioning entity in February 2003 when the Assembly of States Parties elected the 18 judges of the court. In the future, judges will have 9-year terms. The Rome Statute provides that 6 judges will be elected every 3 years. For the first election, to establish the necessary rotation, 6 judges were elected for terms of three years, 6 for 6 years, and 6 for 9 years. The judges constitute a forum of international experts who represent the world's principal legal systems. Judges must be nationals of states parties to the Statute.

Cases may come to the ICC by recommendation of a state party, by recommendation of the Security Council, or through the action of the Chief Prosecutor acting *proprio motu* (on his or her own authority).[86] Articles 11–21 of the statute establish the bases of jurisdiction. In the case of a referral from a state party, Article 12.2 provides that state referral must satisfy one of two conditions: the crime must have been committed on the territory of the requesting state (or within other "territorial" jurisdiction, such as aircraft or vessel registered in the state), and/or by a national of the requesting state. A nonstate party may refer a case if it explicitly accepts the jurisdiction of the court and agrees to cooperate fully (Article 12.3).

Sierra Leone[87]

Although endowed with abundant natural resources (particularly diamonds), Sierra Leone ranks as one of the poorest countries in the world. Since gaining independence from Great Britain in 1961, the country has had a history of political instability. The events that led to the establishment of the Special Court for Sierra Leone began in the late 1980s. In large part, the roots of the violence stemmed from attempts to control the diamond industry. The civil war in neighboring Liberia contributed as well. Charles Taylor, leader of the National Patriotic Front of Liberia, provided money and support to Foday Sankoh to form the Revolutionary United Front (RUF). In return, Taylor received diamonds from Sierra Leone. The RUF launched its first campaign into eastern Sierra Leone from Liberia in late March 1991. In the months following, over 100,000 refugees fled the conflict into Guinea.

In June 2000, President Ahmad Tejan Kabbah wrote to United Nations Secretary–General Kofi Annan, requesting the UN to authorize a court to deal with crimes during the conflict. In August 2000, the United Nations

Security Council adopted Resolution 1315 requesting the Secretary–General to start negotiations with the Sierra Leonean government to create a special court. On January 16, 2002, the UN and government of Sierra Leone signed an agreement establishing the court.[88] The court had authority to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.

As of December 2012, the SCSL had indicted 13 people and tried 9. This included the first sitting African head of state, Charles Taylor, then President of Liberia. Taylor was conviction of war crimes, crimes against humanity, and other violations of international law.[89] With the issue of the appeals judgment in September 2013, the SCSL became the first special tribunal to have completed its mandate.[90] The court had the distinction of being the first international tribunal to convict people for crimes relating to the conscription and recruitment of children younger than 15 into hostile forces. In addition, Taylor's indictment and trial also reaffirmed an important principle that nullifies head-of-state immunity for those who commit serious breaches of IHL and crimes against humanity.

The International Criminal Court[91]

Tracing the history of efforts to construct the International Criminal Court involves following two separate tracks: the effort to draft an international criminal code and initiatives for an independent international court. A permanent court that would hear cases of international criminal law has been widely discussed by scholars for over a century and seriously debated since the conclusion of World War I. In November 1947, the General Assembly charged the International Law Commission with two tasks: first, to formulate the principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal; and second, with careful attention to these principles, to prepare a draft code of offenses against the peace and security of mankind.[92] However, it took the events in Yugoslavia to jump-start the process after a 35-year hiatus.

The Rome Statute entered into force on July 1, 2002 (60 ratifications). Of the five permanent members of the UN Security Council, Britain and France have ratified the statute, the Russian Federation has signed it (September 2000), China has not signed, and the United States has "withdrawn" its signature. Of others, Germany and Italy have ratified, Japan did not sign; Iran signed (December 2000), Iraq did not. Neither India nor Pakistan signed.

By the terms of the Rome Statute, the prosecutor can initiate an investigation on the basis of a referral from any state party or from the United Nations Security Council. In addition, the prosecutor can initiate investigations *proprio motu* (on their own initiative) on the basis of information on crimes within the jurisdiction of the court received from individuals or organizations (Article 15). At this writing (July 2015), 22 cases involving 9 situations have been brought before the International Criminal Court: Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur (Sudan), Republic of Kenya, Libya, the Republic of Côte d'Ivoire, the Republic of Mali, and the Central African Republic II. These cases have resulted in 32 indictments.[93] The fact that all situations seized by the court are in Africa has led to accusations of bias and racism. Note, however, that a number of investigations are under way outside Africa, including cases in Afghanistan, Colombia, Georgia, Honduras, Iraq, and the Ukraine.[94] As the *Economist* stated, "As a work in progress, the ICC has been moving glacially—but in the right direction."[95]

PROBLEMS AND PROSPECTS

As with the tribunal at Nuremberg, the ICTY and the ICTR have had to deal with the difficulties inherent in trying to draw from both the civil and common law traditions as well as international human rights law.[96] Moreover, despite the Security Council mandate, the tribunals have no independent means of enforcement beyond the active cooperation of national authorities. From the beginning, the ICTY had problems in rounding up the principal planners and instigators of the events for trial. The same holds true for the ICC. In the case of the ICTY, the lack of political will on the part of all involved undermined efforts to arrest the individuals most responsible for the atrocities in the Balkans and hindered its operation until 1998, when Prime Minister Tony Blair directed British troops acting as peacekeepers in the Balkans to actively pursue those wanted. This resulted in a number of high-profile arrests. Under considerable diplomatic (economic) pressure, Serbia finally surrendered Slobodan Milošević in 2001.[97] Only in July 2008 did the arrest of Radovan Karadžić, one of the most wanted, take place. His compatriots, Ratko Mladić and Goran Hadžić, were not apprehended until mid-2011. At this writing (July 2015), the ICTY has concluded trial proceedings against all but one (Ratko Mladić) of the 161 indictments issued.[98]

ASSESSING THE IMPACT

In sum, what have the courts accomplished? Obviously, we have to weigh the negatives against the accomplishments. Nonetheless, as a reminder of the ongoing controversies here, remember that for many individuals, the weights assigned to the various elements in the balance sheet, and hence the worth of the overall projects, will vary according to deeply held prior assumptions (philosophical beliefs) about the merits of undertaking the project in the first place. The questions then revolve around more than appropriate measures of weight; they involve selecting the appropriate elements to include in the balance sheet as part of any evaluation. The positions reflect many different dimensions. Some have been addressed earlier in this chapter, some in earlier chapters. The following will briefly recap those voiced most often.

Adherents of *political realism* will reject the effort out of hand as no more than an expensive cosmetic window dressing that may produce some short-term results but will have no meaningful long-term impact. Many who oppose U.S. participation in the ICC go beyond this position to assert that institutions such as the ICC will actually have a long-term negative impact.[99] They emphasize that reconciliation, not retribution, provides the necessary process for healing the schisms opened and exacerbated by situations such as Rwanda.[100]

Philosophical objections aside, what have the courts accomplished? The ad hoc courts represent first steps. They faced enormous difficulties in that they literally had to develop and evolve both procedural standards and substantive definitions from scratch. On the positive side, the courts have succeeded in that task. They have also managed to prosecute a number of high-profile defendants, including ex-heads of state. Cost-effectiveness aside, punishing some still sends a message because others may live in fear. In that sense, the courts have both established a relatively coherent body of practice and made inroads into the "culture of impunity." The trials have had another, perhaps unintended, consequence. They have produced important oral and documentary evidence crucial to a full understanding of the events in the former Yugoslavia, Rwanda, and Sierra Leone. Without the trials, much of the full horror of the events revealed through investigation and testimony quite possibly would not have become part of any permanent record. Governments, participants, and even victims often suffer from selective amnesia, albeit for different reasons. To a great extent, history as we know it comes from the records of victors, not losers.

In looking back, two fundamental questions emerge: at what cost, and to what effect? Even the staunchest of advocates acknowledge that, to have an ongoing impact, the process needs much improvement. The future depends on whether or not the ICC and other international courts can overcome their crippling failure to work expeditiously and effectively—and especially, cost-effectively. Consider not only the length and cost of individual trials but the length of time the entire process has taken. Granted, much of this in terms of the early years occurred because judges, conservative by training and experience, proceeded very cautiously because they had no firm guidelines. Everyone involved knew each early case charted new ground. They proceeded cautiously and carefully. Future cases in other courts might proceed more expeditiously because they can draw on the "cautious and careful" approach. If they cannot, this will become a serious impediment to the dreams of abolishing the culture of impunity.

The Milošević trial, in terms of length, cost, and seeming ineptness of those responsible to make decisions to move it along expeditiously, gave critics much to criticize. It illustrates all of the problems of developing a completely new legal regime at the international level. The trial made real, and in prime time, all of the potential pitfalls of international legal procedure as a tool of retributive justice. As the first international trial of a head of state, the court, among other decisions, chose to err on the side of granting the defense considerable latitude in presenting its case rather than giving the impression of unfairness by imposing strict procedural limits.[101] The ICC needs to take this trial as the paradigm case of what must be improved if it is to establish credibility and legitimacy.

Do these cases exert enough of a "compliance pull" to act as deterrents to future perpetrators? Sadly, the answer here must be, for the moment, no. The troubled genesis of the courts and the sporadic and often reluctant support given by many states in terms of putting their "blood and treasure" in support of the principles they mouth in public still raise questions of how far-reaching the collective processes will be in terms of deterrence. Though often advanced as a rationale for international justice, here we should note that deterrence does not offer the best standard of evaluation even at the domestic level. We tend to overestimate the impact of deterrence as a factor in compliance with domestic law. Burglaries, car theft, domestic violence, and murder continue as major problems for domestic police. The fact that some who commit these acts have received punishment does not necessarily deter others from committing the same offense, sometimes over and over. Considering the sporadic application and ponderous pace of international justice, one should not expect that these trials will exert a deterrent effect in the short run. Regardless, the precedents that have established liability for certain acts do mark progress. The international climate with respect to the validity of international criminal law has undergone a sea change over the past 15 years. The problem will be to maintain the momentum established by the tribunals.

To reiterate some points in a paraphrase, the wheels of international justice, when they have turned, have turned slowly, ponderously, and at great expense. In the immediate future, the ability of the ICC to bring those indicted to trial in a timely manner, and conduct trials in an expeditious fashion, will tell us much about effectiveness and long-term impact. At the same time, keep in mind that the ICC also faces considerable start-up costs in terms of establishing its own "institutional culture" and procedures. While not as great as those associated with the ad hoc courts because the ICC can draw on their experience as well as their substantive and procedural precedents, the court will still face the necessity of carving out its own niche—that is, establishing its own credibility. The progress in executing the indictment against President Omar al-Bashir for acts of genocide in Darfur will provide an immediate test for the court as well as for the seriousness of the international community in moving forward.[102]

A FINAL NOTE: THE UNITED STATES AND THE ICC

The policy of the United States with respect to the ICC can be summed up simply. The United States will back the court only if a guarantee exists that will ensure that no American will ever face prosecution before it.[103] The fear of an independent court does not rest on unwarranted concerns. Recall the earlier discussions of the attempts to secure warrants of arrest for President George W. Bush, President Bill Clinton (for the bombing of Serbia), former Secretary of State Henry Kissinger, and former Secretary of Defense Donald Rumsfeld for violations of international humanitarian law. The U.S. concerns have genuine foundations. In terms of outliers, China and Russia, two other permanent members of the UN Security Council, have joined the United States in not ratifying the Statute. Hence, three of the five permanent members of the SC have opted out. France and the UK (Great Britain) have joined but remain outside the ICC regime. Even so, the ICC is now a reality, with more states acceding to the regime each year.

In the years since the Rome Conference, it is difficult to see what active opposition to the ICC has gained the United States. Opposition to the ICC has severely damaged U.S. leadership with regard to issues and actions relating to war crimes and crimes against humanity. How can you promote a regime if you then wish to claim a “special exemption” from its rules? Leadership by dictation may have worked in the Cold War, but others now have powerful voices and the capacity to project their own visions of world order. Rather than seeing the Rome Conference as the latest instance of multilateral diplomacy gone awry, the United States should treat it as a positive lesson for future reference. Rather than engaging in an extended discussion here, one must ask the question, would the United States have more impact on what the ICC does as a state party to the treaty, an insider with concerns, than as an outsider with a reputation for being a crybaby and bully, no matter how powerful? Funny, while denying that realpolitik reasoning underlies many decisions, the United States has always decried the reasoning while engaging in the practices.

Notes

PREFACE

1. The quote presumably was used in the early 1950s by UCLA football coach Harold (Red) Saunders. See, Michael W. Austin, "Winning Isn't Everything," *Psychology Today* (July 12, 2010), https://www.psychologytoday.com/blog/ethics-everyone/201007/winning-isnt-everything.

CHAPTER 1

1. "Il est défendu de tuer; tout meurtrier est puni, à moins qu'il n'ait tué en grande compagnie, et au son des trompettes." "Rights," *Questions sur l'Encyclopédie* (1771).

2. In *Don Quixote* (1604), Cervantes wrote, "Love and war are all one; and, as in war it is lawful to use sleights and stratagems to overcome the enemy, so, in amorous strifes and competencies, impostures and juggling-tricks are held for good, to attain to the wished end." Miguel de Cervantes, *The History of the Valorous & Witty Knight-Errant Don Quixote of the Mancha*, trans. Thomas Shelton, Part II, ch. 21, http://www.online-literature.com/cervantes/don_quixote/89/.

3. Karl von Clausewitz, *On War,* ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 75–76.

4. For a short summary, see Joshua J. Mark, "War," *Ancient History Encyclopedia*, http://www.ancient.eu/war/.

5. Numbers 21:2–3; Deuteronomy 20:17; Joshua 6:17, 20, 21, 24. Later, in defending the faith and state, King Saul annihilated the Amalekites (1 Samuel 15), incurring God's wrath by sparing their king. See David J. Bederman, *International Law in Antiquity* (Cambridge, UK: Cambridge University Press, 2001), 243–244. Bederman points out that this practice did not differ from that of the Canaanites.

6. Although precise figures may never be known, an estimated 56,000 men perished in Civil War prisons, a casualty rate far greater than any battle during the war's bloody duration. Yancey Hall, "U.S. Civil War Prison Camps Claimed Thousands," *National Geographic News*, http://news.nationalgeographic.com/news/pf/34127396.html.

7. K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge, UK: Cambridge University Press, 2004), 143–144.

8. Martin van Creveld, *Technology and War: From 2000 BC to the Present* (New York: The Free Press, 1989), 73.

9. See "Booby Traps," 5th Battalion, The Royal Australian Regiment Association website, http://www.5rar.asn.au/weapons/boobytraps.htm.

10. Martin van Creveld, *The Changing Face of War: Combat from the Marne to Iraq* (New York: Ballantine, 2007), 165.

11. The controversy surrounding former vice president Dick Cheney's defense of U.S. use of torture at the Guantanamo Bay detentions camp centers on these two questions. See Carrie Dann, "Cheney on Interrogation Tactics: 'I Would Do It Again in a Minute,'" NBC News (December 14, 2014), http://www.nbcnews.com/meet-the-press/cheney-interrogation-tactics-i-would-do-it-again-minute-n268041.

12. Raymond Aron, *Paix et guerre entre les nations* (Paris: Calmann-Lévy, 1962), 767; translation: *Peace and War: A Theory of International Relations*, trans. Richard Howard and Annette Baker Fox (Garden City, NY: Doubleday & Company, 1966).

13. Barbara W. Tuchman, *The Guns of August: The Outbreak of World War I* (New York: Macmillan, 1962), ch. 1.

14. "Atomic Education Urged by Einstein," *New York Times* (May 25, 1946).

15. Michael Stephenson, *The Last Full Measure: How Soldiers Die in Battle* (New York: Random House, 2012), 251.

16. Ibid., and sources cited. Note that the United States lost an estimated 291,557. Stephenson, 252.

17. Interestingly, *none* of the classic 19th-century international law texts, nor any of the first four editions of Oppenheim (the fourth in 1919), published after the presumably landmark *Caroline* case mention the case or self-defense as a legal concept. Like Oppenheim, all refer to the broader and older rationale of self-preservation. For a discussion, see James Larry Taulbee, "Governing the Use of Force: Does the Charter Matter Anymore?" *Civil Wars* 4, no. 2 (2001): 1–58.

18. What is the permissible goal of legitimate self-defense—to repel the immediate danger, to "teach a lesson," or to remove any future danger? These are three very different standards. Note that because of the nature of contemporary circumstances related to terrorist attacks, the debate over time and perceived necessity of taking action has conflated two very different concepts: *self-defense* as an immediate response, and *retaliation* as a punishment or warning not to repeat. On the issues, see James Larry Taulbee and John Anderson, "Reprisal Redux," *Case Western Journal of International Law* 16, no. 3 (1984): 309–337.

19. Michael Howard, "Constraints on Warfare," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulous, and Mark R. Sherman (New Haven, CT: Yale University Press, 1994), 2; see also Christopher Coker, *Ethics and War in the 21st Century* (London: Routledge, 2008).

20. Note I have chosen to use "ius" instead of the more common "jus" because the Roman/Latin alphabet did not contain a J.

21. Arthur Nussbaum, "Just War: A Legal Concept?" *Michigan Law Review* 42, no. 3 (1943): 454.

22. The early Christian church had a very strong pacifist orientation gleaned from the Gospels.

23. Taulbee, "Governing the Use of Force," 2–5.

24. I would not dispute this statement as it applies to American and other Western European armies. A good friend, a retired lieutenant general (three stars), complained to me that every soldier now needed a [bleeping] lawyer by his side to interpret the rules when going into combat.

25. See for example, Louise Arbour, "The Laws of War: Under Siege or Gaining Ground?" Kirby Lecture at the Australian National University, Canberra (June 23, 2011), http://www.crisisgroup.org/en/publication-type/speeches/2011/the-laws-of-war-under-siege-or-gaining-ground.aspx; Daniel Thürer, "International Humanitarian Law: Essence and Perspectives," http://www.ivr.uzh.ch/institutsmitglieder/thuerer/forschung/SZIER.pdf.

26. Plutach, "Pyrrhus," in *The Lives of the Noble Grecians and Romans*, trans. Bernadotte Perrin (Cambridge, MA: Loeb Classical Library, 1923), 413 §21:10.

27. Often attributed to Nikita Khrushchev, this quote has no reliable provenance. I first heard it used by Herman Kahn in a seminar discussion (1965) of potential scenarios depicting possible conditions of life after a nuclear exchange between the United States and the Soviet Union. See Herman Kahn, *Thinking about the Unthinkable* (New York: Avon, 1964).

28. The Austrian foreign minister, Prince Metternich, said: "Diplomacy is the art of avoiding the appearance of victory." Quoted in David P. Barash, "Diplomacy, Negotiation, and Peaceful Settlement," in *Teaching about International Conflict and Peace*, ed. Mary M. Merryfield and Richard C. Remy (Albany, NY: State University of New York Press, 1995), 195. Unfortunately, contemporary neo-realists too often choose to ignore this central precept.

29. Bruce Catton, *The Civil War* (New York: American Heritage, 1960), 173.

30. For an interesting perspective on the evolution of American attitudes, see Paul Fussell, *Wartime: Understanding and Behavior in the Second World War* (Oxford, UK: Oxford University Press, 1989), 9.

31. Geoffrey Parker, "Early Modern Europe," in Howard et al., *The Laws of War*, 57.

32. Thomas Schelling, *Arms and Influence* (New Haven, CT: Yale University Press, 1967), 4.

33. David P. Barash and Charles P. Webel, *Peace and Conflict Studies*, 3rd ed. (Los Angeles, CA: Sage, 2013), 277.

34. David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), 32.

35. Robert B. Strassler, ed., *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York: The Free Press, 1996), Book I:88, 49.

36. President Dwight D. Eisenhower, "Domino Theory Principle," Public Papers of the Presidents, Dwight D. Eisenhower (1954), 381–390.

37. Bertrand Russell, *Human Society in Ethics and Politics* (New York: Simon & Schuster, 1955), 110.

38. Aristotle, *Politics*, I:3 §8. Aristotle saw war-making and raiding as one of seven important *technes*—that is, an art or craft.

39. J. F. Verbruggen, *Art of Warfare in Western Europe during the Middle Ages from the Eighth Century to 1340*, trans. Sumner Willard and S. C. M. Southern (Amsterdam, NL: North Holland Publishing Company, 1977), 30–31.

40. For a study of the role of warfare and issues that generated wars in Europe prior to Westphalia, see Barbara W. Tuchman, *A Distant Mirror: The Calamitous 14th Century* (New York: Knopf, 1978). For the period after Westphalia, see K. J. Hosti, *The State, War, and the State of War* (Cambridge, UK: Cambridge University Press, 1996).

41. Creveld, *Technology and War*, 5.

42. Victor Davis Hanson, *Carnage and Culture: Landmark Battles in the Rise of Western Power* (New York: Random House, 2001), 110.

43. "Battle of Pydna." *Encyclopædia Britannica Online* (2015), http://www.britannica.com/EBchecked/topic/484531/Battle-of-Pydna. Stephenson, *The Last Full Measure*, 43–44.

44. Hoffman Nickerson, *The Turning Point of the Revolution or Burgoyne in America* (Cambridge, MA: Riverside Press, 1928), 206. Oriskany stands as the bloodiest single battle in the American Revolution.

45. Stephen W. Sears, *Landscape Turned Red: The Battle of Antietam* (New Haven, CT, and New York: Ticknor & Fields, 1983).

46. See Trevor Bryce, *The Kingdom of the Hittites* (Oxford, UK: Oxford University Press, 1998).

47. Von Creveld, *Technology and War*, 13–14, 15.

48. R. H. Bautier, *The Economic Development of Medieval Europe* (New York: Harcourt, Brace, Jovanovich, 1971), 18–57.

49. Geoffrey Barraclough, *The Crucible of Europe: The Ninth and Tenth Centuries in European History* (Berkeley: University of California Press, 1976), 28–30.

50. Philippe Contamine, *War in the Middle Ages*, trans. Michael Jones (Oxford, UK: Blackwell Publishers, 1984), 31.

51. Walter Ullman, *Law and Politics in the Middle Ages* (Ithaca, NY: Cornell University Press, 1975), 71–76. Ullman argues the doctrine of empire and the European claim to the mantle of Rome dates from the ninth century.

52. See Ullman, *Law and Politics*, 51–116; Maurice Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & Kegan Paul, 1965), 14–16.

53. *Oxford Dictionaries*, http://www.oxforddictionaries.com/definition/english/fief. On the complexity of the military system see, Michael Prestwich, *Armies and Warfare in the Middle Ages: The English Experience* (New Haven, CT: Yale University Press, 1998), 12–16.

54. Bautier, *Economic Development*, 88–96. See also Robert S. Lopez, *The Commercial Revolution of the Middle Ages, 950–1350* (Englewood Cliffs, NJ: Prentice Hall, 1971).

55. Thucydides, *The Peloponnesian* War, trans. Benjamin Jowett (New York: Bantam, 1960), 7.13. Redlich has argued that war created employment and should be seen as a form of redistribution ("dishoarding") that actually generated jobs, income, and active purchasing power to somewhat offset the concomitant destruction. Fritz Redlich, *The German Military Enterpriser and His Work Force: A Study in European Economic and Social History*, vol. I (Wiesbaden, DE: Franz Steiner Verlag, 1964), 118.

56. Contamine, *War in the Middle Ages*, 93.

57. Christopher Allmand, *The Hundred Years War: England and France at War c. 1300–c. 1450* (Cambridge, UK: Cambridge University Press, 1988), 46.

58. Michael E. Mallett, *Mercenaries and Their Masters: Warfare in Renaissance Italy* (London: The Bodley Head, 1974), 50.

59. Clifford J. Rogers, "The Age of the Hundred Years' War," in *Medieval Warfare: A History*, ed. Maurice Keen (Oxford, UK: Oxford University Press, 1999), 148–151.

60. Contamine, *War in the Middle Ages*, 151–152. For a very readable account of struggles in the 14th century, see Tuchman, *A Distant Mirror*.

61. P. S. Lewis, *Later Medieval France* (London: Macmillan, 1968), 47. Powicke concludes that the last two centuries of the Middle Ages saw the rise and triumph of the contractual system of raising armies in England, where before the use of mercenaries had simply been an alternative to the militia. Both mercenaries and the militia were considered to be auxiliaries (and occasionally a counterpoise) to the feudal levy. Michael Powicke, *Military Obligation in Medieval England: A Study in Liberty and Duty* (Oxford, UK: The Clarendon Press, 1962), 39, 166.

62. Note that Edward III banished the free companies in 1361 but still found them useful for his continental ventures. Keen, *The Laws of War*, 93.

63. Edouard Perroy, *The Hundred Years War* (New York: Capricorn Books, 1964), 123–124. For example, various members of the d'Albret family of Guyenne, much admired by Jean Froissart in his *Chronicles* (trans. John Joliffe (Baltimore, MD: Penguin, 2001)), spent the greater part of the 1360s seeking, extending, or renewing their fortunes (depending upon the individual) in activities at some distance from their seat of power.

64. Christine de Pisan, *The Book of Fayttes of Armes and of Chyualrye*, trans. W. Caxton, ed. A. T. P. Byles (London: Oxford University Press, 1937), 199–201.

65. Mallett, *Mercenaries and Their Masters*, 37

66. Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello*, trans. James Leslie Brierly, ed. Thomas Erskine Holland (New York: Oceana, 1964), ch. 17, 235.

67. See Carlos M. Cipolla, *Guns, Sails and Empires: Technological Innovation and the Early Phase of European Expansion, 1400–1700* (New York: Pantheon, 1965); W. H. McNeil, *The Pursuit of Power: Technology, Armed Forces and Society* (Chicago: University of Chicago Press, 1982).

68. Philip Bobbit, *The Shield of Achilles: War, Peace and the Course of History* (New York: Alfred A. Knopf, 2002), chs. 6–8; John Beeler, *Warfare in Feudal Europe, 730–1200* (Ithaca, NY: Cornell University Press, 1971); Sir George Clark, *The Seventeenth Century*, 2nd ed. (New York: Oxford University Press, 1947.); Holsti, *The State, War, and the State of War*; Holsti, *Taming the Sovereigns*; and Holsti, *Peace and War Armed Conflicts and the International Order 1648–1989* (Cambridge, UK: Cambridge University Press, 1991).

69. Osgood, "The Expansion of Force," in *Force, Order, and Justice*, 41–42 (emphasis added).

70. Ibid., 42.

71. Jack A. Goldstone, "States Making War Making States Making War . . . " *Contemporary Sociology* 20, no. 2 (1991): 176, a review of Charles Tilly, *Coercion, Capital and European States, 990–1990* (Oxford and Cambridge: Basil Blackwell, 1990).

See also John A. Armstrong, *Nations before Nationalism* (Chapel Hill: University of North Carolina Press, 1982).

72. Quoted in John Gooch, *Armies in Europe* (London: Routledge & Kegan Paul, 1980), 11.

73. Even so, Frederick died believing that using foreigners to fight constituted shrewd statecraft. R. R. Palmer, "Frederick the Great, Guibert, Bülow: From Dynastic to National War," in *Makers of Modern Strategy: From Machiavelli to the Nuclear Age*, ed. Peter Paret (Princeton, NJ: Princeton University Press, 1986), 98.

74. *The Landmark Thucydides*, 1.70.

75. Palmer, "Frederick the Great," 92.

76. See Reinhard Bendix, *Nation-Building and Citizenship*, 2nd ed. (Berkeley: University of California Press, 1977).

77. René Albrecht-Carrié, *A Diplomatic History of Europe since the Congress of Vienna* (London: Methuen, 1958), 66.

78. Alan Forrest, "Citizenship and Military Service," in *The French Revolution and the Meaning of Citizenship*, ed. Renée Waldinger, Philip Dawson, and Isser Woloch (Westport, CT: Greenwood Press, 1993), 153–165. See also John R. Elting, *Swords Around the Throne: Napoleons Grande Armée* (New York: The Free Press, 1988), 322–323; Deborah Avant, "From Mercenary to Citizen Armies: Explaining Change in the Practice of War," *International Organization* 54, no. 1 (Winter 2000): 41–72.

79. Martin van Creveld, *Command in War* (Cambridge, MA: Harvard University Press, 1985), 23–24.

80. Of the 25 infantry battalions Great Britain initially sent to the Crimea, only six had seen service since the end of the Napoleonic Wars. Only a very small minority of either officers or men had any prior combat experience. Edward M. Spiers, *The Army and Society, 1815–1914* (London: Longman, 1980), 98.

81. Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991), 13–14.

82. Gwynne Dyer, *War: The New Edition* (Toronto, CA: Random House-Vintage, 2004), 266.

83. See Paul M. Kennedy, *The Rise and Fall of British Naval Mastery*, 2nd ed. (Amherst, NY: Humanity Books, 1986), chs. 9, 10.

84. So named after the popular tourist guides of the time because of an offhand comment by a prominent German journalist. See World History Project, "German Luftwaffe Bombs English City of Bath as Part of the Baedeker Blitz," http://worldhistoryproject.org/1942/4/25/german-luftwaffe-bombs-english-city-of-bath-as-part-of-the-baedeker-blitz.

85. Creveld, *The Changing Face of War*, 144. For a discussion of Soviet losses, see William Moskoff, *The Bread of Affliction: The Food Supply in the USSR during World War II* (Cambridge, UK: Cambridge University Press, 1990).

86. Note, however, Article 107 concerning ex-enemy states: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

87. See Peter W. Singer, *Wired for War: The Robotic Revolution and Conflict in the 21st Century* (New York: Penguin, 2010).

88. Victor Davis Hanson, *The Western Way of War: Infantry Battle in Classical Greece* (New York: Knopf, 1989), 135–159. See also the seminal work of John Keegan, *The Face of Battle: A Study of Agincourt, Waterloo, and the Somme* (New York: Penguin, 1976).

89. Fussell, *Wartime: Understanding and Behavior in the Second World War*, ix.

90. Patrick Cockburn, "War on ISIS: Flood of Jihadi Volunteers to Syria 'Unstoppable,' Warns Turkish Prime Minister," *The Independent* (January 21, 2015), http://www.independent.co.uk/news/world/middle-east/war-on-isis-flood-of-jihadi-volunteers-to-syria-is-unstoppable-warns-turkish-prime-minister-9993740.html; Rym Ghazal, "Romanticism of War Drives the Impressionable to an Ugly Fate," *The National* (February 12, 2014), http://www.thenational.ae/thenationalconversation/comment/romanticism-of-war-drives-the-impressionable-to-an-ugly-fate.

91. Mary A. Favret, *War at a Distance: Romanticism and the Making of Modern Wartime* (Princeton, NJ: Princeton University Press, 2009), 15; George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton, NJ: Princeton University Press, 2002).

92. Many would include piracy here, but the rules against piracy varied until mid-18th century—truly one king's pirate was another's "privateer." After all, Sir Francis Drake and Sir Robert Morgan gained their status by attacking ports and capturing Spanish gold shipments in the Caribbean. The Cinque Ports (Hastings, New Romney, Hythe, Dover, and Sandwich), "formed to furnish ships and men for the king's service," also had a reputation for being a hotbed of piracy until the beginning of the 16th century.

93. Quoted in Anthony King, *The Combat Soldier: Infantry Tactics and Cohesion in the Twentieth and Twenty-First Centuries* (Oxford, UK: Oxford University Press, 2013), 77.

94. For Agincourt, see Keegan, *The Face of Battle*, 81–82; for a description of the trench system in World War I, see Creveld, *Changing Face of War*, 46–49.

95. National Park Service, "Casualties of Battle: Antietam," http://www.nps.gov/anti/learn/historyculture/casualties.htm.

96. Stephenson, *The Last Full Measure*, 189.

97. Creveld, *Changing Face of War*, 49.

98. R. A. Kulka, W. E. Schlenger, J. A. Fairbank, R. L. Hough, B. K. Jordan, C. R. Marmar, and D. S. Weiss, *Contractual Report of Findings from the National Vietnam Veterans' Readjustment Study: Volumes 1–4* (North Carolina: Research Triangle Institute, 1988). A copy of the study is available at the U.S. Department of Veterans Affairs website, http://www.ptsd.va.gov/professional/research-bio/research/nvvrs-docs.asp.

99. "Veterans Statistics: PTSD, Depression, TBI, Suicide," http://www.veteransandptsd.com/PTSD-statistics.html; see also Terri Tanielian and Lisa H. Jaycox, eds., *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* (Santa Monica, CA: RAND Corporation, 2008).

100. Emily Badger, Wonkblog: "Why the Iraq War Has Produced More PTSD Than the Conflict in Afghanistan," *Washington Post* (April 3, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/03/why-the-iraq-war-has-produced-more-ptsd-than-the-conflict-in-afghanistan.

101. Publius Flavius Vegetius Renatus, *Epitoma Rei Militaris*, trans. and ed. Michael D. Reeve (Oxford, UK: Oxford University Press, 2004); also reproduced as *De Re Militari* [Concerning Military Matters].

102. Charles Moskos found that the American forces in Vietnam suffered a decline in morale during 1970–1973. By this time, the patriotic justifications for the war had come into question. He attributes the decline in part to the year term-of-service requirement. After nine months, soldiers became more focused on surviving their "days of remaining service" (their DEROS, date eligible for return from overseas), than with any concern for missions or comrades. Charles Moskos, "The American Combat Soldier in Vietnam," *Journal of Social Issues* 31, no. 4 (1975), 30–31.

CHAPTER 2

1. Robert B. Strassler, ed., *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York: The Free Press, 1996), 3.82.2. Translations differ somewhat. The Landmark edition actually translates the passage as "War is a 'rough master.'"

2. Harry Sidebottom, *Ancient War: A Very Short Introduction* (Oxford, UK: Oxford University Press, 2004), 16.

3. Natural law claims that the conditions of legal validity are not exhausted by social facts. The moral content of the presumed norms also bears on their legal validity. As the famous dictum of Saint Augustine holds: "Unjust law is not law" ("*lex iniusta non est lex*"), Augustine, *De Libero Arbitrio* (1.5.33) in *On the Free Choice of the Will*, trans. A. S. Benjamin and L. H. Hackstaff (Indianapolis, IN: Bobbs-Merrill, 1964). Note that this clearly does not mean that an "unjust law" will not be enforced by those who enacted it, but it does emphasize that a governing entity can do wrong through its laws.

4. Carol von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 149.

5. Michael Howard, *Clausewitz: A Very Short Introduction* (Oxford, UK: Oxford University Press, 2002), 1.

6. Quoting Arthur Wegner, *Geschicte des Völkerrecthts* (Stuttgart: W. Kohlhammer 1936), David Bederman, *International Law in Antiquity* (Cambridge, UK: Cambridge University Press, 2001), 209.

7. Bederman, *International Law in Antiquity*, 208; also M. G. Goodman and A. J. Holladay, "Religious Scruples in Ancient Warfare," *Classical Quarterly* 36, no. 1 (1986): 151–171.

8. See Sidebottom, *Ancient War: A Very Short Introduction*; Yves Garlan, *War in the Ancient World*, trans. Janet Lloyd (New York: W. W. Norton, 1975). On Greek practice and war in antiquity see Jean Pierre Vernant, *Problèmes de la guerre en Grèce antique* (The Hague: Mouton, 1968); Pierre Ducrey, *Guerre et guerriers dans la Grèce antique* (Paris: Payot, 1985); W. Kendrick Pritchett, *The Greek State at War* (5 vols) (Berkeley: University of California Press, 1971–1991).

9. Josiah Ober, "Classical Greek Times," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopoulos, and Mark R. Shulman (New Haven, CT: Yale University Press, 1997), 12.

10. Pritchett, *The Greek State at War*.

11. Victor Davis Hanson, *The Western Way of War* (New York: Alfred A. Knopf, 1989).

12. Robert B. Strassler, ed., *Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York: The Free Press, 1996), 3.59.1, 6.4.5.

13. Ober, "Classical Greek Times," 13; Sidebottom, *Ancient Warfare*, 55.

14. Bederman, *International Law in Antiquity*, 212–222. On the question of neutrality, see Robert A. Bauslaugh, *The Concept of Neutrality in Classical Greece* (Berkeley: University of California Press, 1991).

15. Hanson, *Western Way of War*, 35.

16. Thomas R. Martin, *Ancient Greece from Prehistoric to Hellenistic Times* (New Haven, CT: Yale University Press, 2000), 59.

17. Ober, "Classical Greek Times," 18.

18. The Athenians invaded Megarian territory twice a year from 431 to 424 BC, Thucydides, 2.13.2; 4.66.1.

19. Bederman, *International Law in Antiquity*, 254.

20. "Fear of gods or law of man there was none to restrain them. As for the first, they judge it to be just the same whether they worshipped them or not, as they saw all alike perishing; and for the last, no one expected to live to be brought to trial for his offenses, but each felt that a far severer sentence had been already passed upon them all and hung over their heads, and before this fell it was only reasonable to enjoy life a little." Thucydides, 2.53

21. Ober, "Classical Greek Times," 23. See also Donald Kagan, *The Fall of the Athenian Empire* (Ithaca, NY: Cornell University Press, 1987).

22. Steven Neff, *War and the Law of Nations* (Cambridge,UK: Cambridge University Press, 2005), 31.

23. Bederman, *International Law in Antiquity*, 43.

24. Ibid., 45.

25. Often mistranslated as "faith" in the narrow sense, *fides* formed an essential element in the character of a man of public affairs, and an essential constituent element of all social and political transactions, public and private. *Fides* implied a *reciprocal and mutual* relationship that involved privileges and responsibilities on both sides. Cicero wrote, "The foundation of justice, moreover, is good faith—that is truth and fidelity to promises and agreements." Cicero, *De Officiis*, trans. Walter Miller (New York: G. P. Putnam, 1913), I.6.23. See also Livy, *History of Rome* (14 volumes), trans. B. O. Foster, Frank G. Moor, Evan B. Sage, and Alfred C. Schlesinger (Cambridge, MA: Harvard University Press, 1919–1959), vol. 5. Polybius is somewhat less judgmental, even describing enemies as fighting bravely and valiantly. *Polybius on Roman Imperialism*, trans. Evelyn S. Shuckburgh (Lake Bluff, IL: Regnery Gateway, 1987). For an analysis of Carthaginian foreign policy, see James Larry Taulbee, "The Mercenary Option: An Apologia for Carthage," *Military and Naval History Journal* 9, no. 1 (April 1999): 1–14, and James Larry Taulbee, "Mercenaries and Citizens: A Comparison of the Armies of Carthage and Rome," *Small Wars and Insurgencies* 9, no. 3 (Spring 1999): 1–16.

26. Cicero, *De Officiis*, I.11.35,36. See also C. E. Brand, *Roman Military Law* (Austin: University of Texas Press, 1968).

27. Polybius, Book II.58.6, 7.

28. Polybius, Book V.11.2–5.

29. Cicero, *De Officiis*, I.11.33.

30. Ibid., I.11.35.

31. Sidebottom, *Ancient Warfare*, 57.

32. For a discussion, see Ibid., 118–122.

33. Robert C. Stacey, "The Age of Chivalry," in *The Laws of War*, ed. Howard et al., 27.

34. Sidebottom, *Ancient Warfare*, 54

35. Neff, *War and the Law of Nations*, 32–34.

36. Aristotle, *The Art of Rhetoric*, trans. W. Rhys Roberts (University of Adelaide), Book I.13, 70, https://ebooks.adelaide.edu.au/a/aristotle/a8rh/.

37. For a description of the formal rites associated with the declaration of war, see Bederman, *International Law in Antiquity*, 231–238; Neff, *War and the Law of Nations*, 27–28.

38. Cicero, *De Officiis*, I.11.36.

39. Mid-third century AD to the end of the eighth century AD.

40. Brent Shaw, "War and Violence," in *Late Antiquity: A Guide to the Postclassical World*, ed. G. W. Bowersock, Peter Brown, and Oleg Grabar (Cambridge, MA: Belknap Press of Harvard University, 1999), 133.

41. John Michael Wallace-Hadrill, *The Barbarian West*, 3rd ed. (London: Hutchinson University Library, 1967), 33; and John Michael Wallace-Hadrill, "War and Peace in the Early Middle Ages," in *Essays in Early Medieval History* (Oxford: Basil Blackwell, 1975), 19–38.

42. Shaw, "War and Violence," 138.

43. Ibid., 148. Shaw also notes that the Sassanid Empire, the main competitor to Rome and Byzantium, also suffered from repeated civil war. Ibid., 153.

44. Warren Treadgold, "The Struggle for Survival (641–780)," in *The Oxford History of Byzantium*, ed. Cyril Mango (Oxford, UK: Oxford University Press, 2001), 147.

45. Shaw, "War and Violence," 141.

46. Michael Grant, *From Rome to Byzantium: The Fifth Century AD* (London: Routledge, 1998), 30.

47. Warren Treadgold, *Byzantium and Its Army, 284–1081* (Palo Alto, CA: Stanford University Press, 1995), 195–197.

48. Sheikh Wahbeh al-Zuhili, "Islam and International Law," *International Review of the Red Cross* 87 (2005): 270.

49. al-Zuhili, "Islam," 272–276.

50. The Hadith is the oral tradition that embodies the words and deeds of the Prophet Muhammad (the Messenger of Allah).

51. Majid Khadduri, "Islam and the Modern Law of Nations," *American Journal of International Law* 50, no. 2 (1956), 356.

52. al-Zuhili, "Islam," 276. The author notes that, while traditional, these categories have no textual support either in the Qu'ran or the Hadith.

53. al-Zuhili, "Islam," 276.

54. Khadduri, 359. Note also the word *mujahada*, translated as "militant struggle."

55. al-Zuhili, "Islam," 281.

56. Augustine, *City of God*, trans. Marcus Dods (New York: Modern Library, 1993), Book 19.7.

57. Maurice Keen, *Chivalry* (New Haven, CT: Yale University Press, 1984), 23–30.

58. Literally the law of the "horse soldier," although in broad form it involved courtly manners.

59. Keen, *The Laws of War*, 24. In the complex web formed by kinship, vassalage, and other obligations sanctioned under oath (e.g., *fief-rentes*), questions of allegiance were seldom straightforward.

60. Philippe Contamine, *War in the Middle Ages*, trans. Michael Jones (Oxford, UK: Blackwell Publishers, 1984), 257.

61. Ibid., 256–257.

62. Which with the advent of Protestantism generated one of the bloodiest periods in European history.

63. For examples of conflicts, see Anthony Mockler, *Mercenaries* (London: Macmillan, 1969), 33–34.

64. Keen, *The Laws of War*, 245. Keen asks rhetorically: "Would the law of arms have meant anything if it had not been for the financial stakes?" Ibid., 243–244.

65. Stacey, "Age of Chivalry," 35.

66. Ibid., 38. The speech Shakespeare has King Henry deliver before the gates of Harfleur accurately describes what could befall those who resist. *Henry V*, Act III.

67. See William Caferro, *John Hawkwood: An English Mercenary in Fourteenth-Century Italy* (Baltimore, MD: The Johns Hopkins Press, 2006); Frances Stonor Sanders, *The Devil's Broker: Seeking Gold, God and Glory in Fourteenth Century Italy* (New York: Harper, 2004).

68. Stacey, "Age of Chivalry," 28.

69. Ibid., 28–29. See also the rather tawdry story of the Fourth Crusade: Donald E. Queller and Thomas F. Madden, *The Fourth Crusade: The Conquest of Constantinople*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1997).

70. Neff, *Warfare and the Law of Nations*, 48–49.

71. Keen, *The Laws of War*, 7–8; Russell, *Just War in the Middle Ages*, 293. On Christian pacifism in the middle ages, see Contamine, *War in the Middle Ages*, 292–296.

72. See for example, Honoré Bonet, *The Tree of Battles: An English Version*, intro. G. W. Coopland (Liverpool, UK: University Press, 1949), 125, 192; and Christine de Pisan, *The Book of Fayttes of Armes and of Chyualrye*, trans. W. Caxton, ed. A. T. P. Byles (London: Oxford University Press, 1937), 10.

73. The crucial components in the operational criteria are: persons, objectives, cause, intention, and valid authority. Russell, *Just War in the Middle Ages*, 129–130; Keen, *The Laws of War*, 104; Contamine, *War in the Middle Ages*, 283–284; James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200–1740* (Princeton, NJ: Princeton University Press, 1975), 58–59.

74. McNeill estimates that the largest of the free companies (circa 1354) may have had as many as 10,000 armed men (plus attendant camp followers). William H. McNeill, *The Pursuit of Power: Technology, Armed Force, and Society since A.D. 1000* (Chicago, IL: University of Chicago Press, 2009), 73–74.

75. Johnson, *Ideology, Reason and the Limitation of War*, 53.

76. Keen, *The Laws of War*, 93–96.

77. Russell, *Just War in the Middle Ages*, 302.

78. Wedgwood describes Germany as "a highway rather than an enclosure, the marching ground of tribes and armies . . . The long succession of the Hapsburgs . . . intimidated but did not control, the lesser princes, who in return opposed all efforts at centralization . . . Imperial power rested ultimately not on the constitution, but on force." C. V. Wedgwood, *The Thirty Years' War* (Garden City, NY: Doubleday, 1961), 34–35, 36, 41.

79. Roger Lockyer, *Habsburg and Bourbon Europe*: *1470–1720* (London: Longman, 1974), 205–208.

80. Fritz Redlich, *The German Military Enterpriser and His Work Force: A Study in European Economic and Social History*, vol. I (Wiesbaden, DE: Franz Steiner Verlag, 1964), 103–107; Steinberg argues that Wallenstein's "international" contingent of colonels ultimately proved more loyal to the emperor than to the paymaster because they calculated the emperor could do more for them in terms of lands, honors, and service after the end of hostilities. S. H. Steinberg, *The Thirty Years War and the Conflict for European Hegemony 1600–1660* (New York: W. W. Norton, 1966), 100–101.

81. Franciscus de Vitoria, *De Indis et de iure belli relectiones*, ed. Ernest Nys (Buffalo, NY: William S. Hein, 1995) (reprint of 1917 Carnegie Endowment edition), § 36–37. That is, did the end justify the means in terms of tangible costs (practical calculation in terms of economy of force, etc.) and did the end justify the means in terms of moral costs (idealism, justice, etc.). *In discussions of military necessity, the two principles are often conflated and confused because a tendency exists to take one or the other as the measure for both.*

82. Vitoria, *De Indis et de iure belli relectiones,* §38. See also James Brown Scott, *Francisco de Vitoria and His Law of Nations* (1934), App. F, CXVIII; and James Brown Scott, *The Spanish Origin of International Law* (Oxford, UK: The Clarendon Press, 1934). *One must be extremely careful in accepting Scott's arguments and conclusions with respect to Vitoria and Suárez.*

83. Idem.; see also David Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford, UK: Oxford University Press, 2008).

84. Johnson, *Ideology, Reason and the Limitation of War*, 20. Vitoria also attempted to mitigate the implication by arguing that war ought not be made on the sole judgment of the king but upon the wisdom of many "wise and upright men." Ibid., 181. Johnson has pointed out that Vitoria intended to give some teeth to the *ius in bello.* Instead, rulers turned the doctrine on its head to justify any resort to war because "invincible ignorance" acted to convince all adversaries that they had just cause.

85. Vitoria does not require the prince to seek out the counsel of the common people, nor does Suárez. Both declare the prince should rely on those who are good and wise and who can use right reason to broaden what may be a narrow self-interested opinion on the issues.

86. All quotes and references are from Francisco Suárez, *Selections from Three Works of Francisco Suárez, S.J., Classics of International Law*, vol. 2, ed. James Brown Scott (Oxford, UK: Clarendon Press, 1944), *De Bello* §VI:8–12. For his arguments rejecting the possibility that war might be concurrently just on both sides, see *De Bello*: §VI:3–6. I should note that Suárez rejects the idea that war might be just on both sides as "entirely absurd" only to qualify his statement by noting that circumstances often mean judgments about claims turn on the "most probable opinion," which he accepts as sufficient.

87. Suárez, *De Bello* §VII:22. Again, in the absence of certainty, the obligation would be to conduct the war with strict adherence to the *ius in bello.*

88. The two major works of Grotius are available in English: *De jure belli ac pacis* [The law of war and peace], trans. F. W. Kelsey et al. (Oxford, UK: The Clarendon Press, 1925) and *The Freedom of the Seas*, trans. Ralph van Deman Magoffin (Oxford, UK: Oxford University Press, 1916). The Kelsey edition draws from

the second, vastly revised version by Grotius, written near the conclusion of the Thirty Years' War. See also Edward Dumbauld, *The Life and Legal Writings of Hugo Grotius* (Norman: University of Oklahoma Press, 1969); Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, UK: Cambridge University Press, 2002); Knud Haakonssen, ed., *Grotius, Pufendorf, and Modern Natural Law* (Aldershot, UK: Dartmouth, 1999).

89. Adam Smith, *Lectures on Justice, Police, Revenue and Arms*, ed. Edwin Canaan (Oxford, UK: The Clarendon Press, 1896), 1.

90. Grotius, *Law of War and Peace* (1625), bk. II, ch. 20.

91. See for example, Richard Zouche (1590–1661).

92. Bynkershoek is famous for one of the most enduring myths about the law of the sea, the "cannon shot rule," which presumed to form the justification of the evolving three-mile territorial sea standard. In actuality, the state of technology had nothing to do with the distance chosen—it represents one marine league (three to four nautical miles), not the range of an 18th-century cannon.

93. For example, see H. Bull, *The Anarchical Society: A Study of Order in International Politics* (Basingstoke, UK: Palgrave Macmillan/Columbia University Press, 2012).

94. The Peace of Westphalia actually consisted of two identical treaties signed at Münster and Osnabrück, two cities in Westphalia, because the two sides refused to meet face to face to negotiate or sign.

95. Leo Gross, "The Peace of Westphalia, 1648–1948," *American Journal of International Law* 42 (1948): 20–41.

96. See F. H. Hinsley, *Power and the Pursuit of Peace* (Oxford, UK: Oxford University Press, 1963).

97. K. J. Holsti, *Peace and War: Armed Conflicts and International Order 1648–1989* (Cambridge, UK: Cambridge University Press, 1999), 141 (emphasis added).

98. G. A. Craig and A. L. George, *Force and Statecraft Diplomatic Problems of Our Time*, 3rd ed. (New York: Oxford University Press, 1995), 19.

99. Geoffrey Parker, "Early Modern Europe," 52.

100. According to Solis, these formed the basis for the English Articles of War. Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 7.

101. Parker, "Early Modern Europe," 58.

102. R. R. Palmer, "Frederick the Great, Guibert, Bülow: From Dynastic to National War," in *Makers of Modern Strategy: From Machiavelli to the Nuclear Age*, ed. Peter Paret (Princeton, NJ: Princeton University Press, 1986), 94.

103. Ibid., 95. The old nursery rhyme "The Duke of York had ten thousand men" perfectly described 18th-century warfare.

104. Gunther Rothenberg, "The Age of Napoleon," in *Makers of Modern Strategy*, ed. Paret, 86.

105. Harold E. Selesky, "Colonial America," in Howard et al., *Laws of War*, 60. The Japanese finally became part of the "civilized" world by sinking a good part of the Russian navy in 1904–1905, giving rise to fears about "the yellow peril."

106. Ibid., 61–62. Selesky identifies a third "humane" argument that held that a short, brutal campaign would save native lives as well by ending the conflict quickly.

107. Ibid., 67.

108. Ibid., 70.

109. Fred Anderson, "Revolutionary War (1775–83): Military and Diplomatic Course," in *The Oxford Companion to American Military History*, ed. John Whiteclay Chambers II (Oxford, UK: Oxford University Press, 1999), 605.

110. Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy* (Princeton, NJ: Princeton University Press, 1961), 4–8.

111. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 19–20. See also David Hackett Fischer, *Washington's Crossing* (Oxford, UK: Oxford University Press, 2004), 375, 376, 378.

112. Witt, *Lincoln's Code*, 36.

113. Selesky, "Colonial America," 81.

114. Witt, *Lincoln's Code*, 43.

115. Emmerich de Vattel, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains (1758)*, trans. C. G. Fenwick (Washington, DC: Carnegie Endowment, 1916; reissue, Hein, 1995). As late as 1887, decisions of the Supreme Court of the United States cited Vattel as an authority.

116. Just before his death Wolff had written an influential treatise *Jus gentium methodo scientifica pertractum* [The Law of Nations According to the Scientific Method 1749] Carnegie Endowment for International Peace, Classics of international law, no. 13, trans Otfried Nippold and Joseph Horace Drake (Buffalo, NY: Hein, 1995).

117. Vattel, *Droit des gens*, III §34.

118. Ibid., III §39, 40.

119. Ibid., VIII §144–157.

120. Ibid., VIII §137, 138.

121. Ibid., VII 141.

122. For a fuller discussion of Vattel's views, see Alexander Orakhelashvili, "The Relevance of Theory and History—The Essence and Origins of International Law," in *Research Handbook on the Theory and History of International Law* (Cheltenham, UK: Edward Elgar, 2011), 12; and Orakhelashvili, "The Origins of Consensual positivism: Pufendorf, Wolff, and Vattel," ibid., 93–110.

123. John R. Elting, *Swords Around a Throne: Napoleon's Grande Armée* (New York: The Free Press, 1988), 39.

124. Rothenberg, "The Age of Napoleon," 95.

125. Ibid., 88.

126. *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. Geneva, August 22, 1864, entered into force: June 22, 1865, https://www.icrc.org/ihl/INTRO/120?OpenDocument.

127. See Henry Dunant, *A Memory of Solferino* (*Un Souvenir de Solferino*), International Committee of the Red Cross, https://www.icrc.org/eng/assets/files/publications/icrc-002–0361.pdf.

128. Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 2007), 77–78.

129. ICRC, Treaties and States Parties to Such Treaties, https://www.icrc.org/ihl/INTRO/120?OpenDocument.

130. Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862), Library of Congress, http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Guerrilla-Parties.pdf.

131. Text at Genera Order No. 100: The Lieber Code, The Avalon Project, Yale Law School, http://avalon.law.yale.edu/19th_century/lieber.asp.

132. The complete text of the manual can be found in John Brown Scott, ed., *Resolutions of the Institute of International Law Dealing with the Law of Nations* (New York: Oxford University Press, 1916), 26, https://archive.org/details/resolutionsofin00instuoft. Geffcken's code may be found in his "*Réglement des lois et coutumes de la guerre*," *Revue de droit international* 26 (1894): 586; see also Carlo Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, vol. IV (Livre numérique 4) (Paris: A. Rousseau, 1896).

133. John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 177. See also Richard Shelly Hartigan, *Military Rules, Regulations and the Code of War: Francis Lieber and the Certification of Conflict* (New Brunswick, NJ: Transaction Publishers, 2010).

134. Carol von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 75.

135. For a discussion, see Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Cambridge, MA: Harvard University Press, 2010), ch. 3; Mark E. Neely, Jr., *The Civil War and the Limits of Destruction* (Cambridge, MA: Harvard University Press, 2007), 198–219.

136. See Edmund Silberner, *The Problem of War in Nineteenth Century Economic Thought*, trans. Alexander H. Krappe (Princeton, NJ: Princeton University Press, 1946); see also Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (New York: W. W. Norton, 1997).

137. "It will be a great war of entrenchments. The spade will be as indispensable to the soldier as his rifle." Ivan Bloch, *The Future of War in Its Technical, Economic and Political Relations* (Lenox, MA: HardPress Publishing, 2013, reissue of 1898 edition), xxvii.

138. See A. C. F. Beales, *The History of Peace: A Short Account of the Organized Movements for International Peace* (New York: Dial Press, 1931).

139. David D. Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference," *American Journal of International Law* 94, no. 1 (2000): 4–30.

140. Calvin D. Davis, *The United States and the First Hague Peace Conference* (Ithaca, NY: Cornell University Press, 1962), 36–53.

141. For a concise discussion, see "Hague Peace Conferences (1899, 1907)," in *The Oxford Companion to American Military History*, ed. John Whiteclay Chambers II (New York: Oxford University Press, 1999), 308–309. Technically, in function and form, the PCA is neither permanent nor a court in that it does not have permanent sitting members, nor does it try cases. The parties have agreed to a settlement through arbitration, not by a "trial." Each case requires an ad hoc panel selected from a list of qualified individuals.

142. *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, October 18, 1907, https://www.icrc.org/ihl/INTRO/195.

143. George H. Aldrich and Christine Chinkin, "A Century of Achievement," *The American Journal of International Law* Vol. 94, No. 1 (Jan., 2000), 90.

144. See James L. Taulbee and John Anderson, "Reprisal *Redux*," *Case Western Reserve Journal of International Law* 16 (1984): 309–337.

145. Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Berkeley: University of California Press, 1958), 27, 29–38.

146. League of Nations Assembly, "Report on the Sino-Japanese Dispute," *American Journal of International Law* 27 (1933 Supp.), 146.

147. Text at http://www.yale.edu/lawweb/avalon/imt/kbpact.htm.

148. These two articles comprise the sum of the obligations in the treaty. See Quincy Wright, "The Meaning of the Pact of Paris," *American Journal of International Law* 27 (1933): 39–61; and especially Edwin Borchard, "The Multilateral Treaty for the Renunciation of War," *American Journal of International Law* 23 (1929): 109–115.

149. Benjamin B. Ferencz, *Defining International Aggression: The Search for World Peace, A Documentary History and Analysis*, vol. I, http://www.derechos.org/peace/dia/Vol1.html.

150. Charles de Visscher, *Theory and Reality in Public International Law*, trans. Percy E. Corbett (Princeton, NJ: Princeton University Press, 1957), 133.

151. Ibid., viii.

152. Tom J. Farer, "Editorial Comment: Beyond the Charter Frame: Unilateralism or Condominium," *American Journal of International Law* 96, no. 2 (2002): 361.

153. ICRC, *Convention Relative to the Treatment of Prisoners of War, Geneva*, July 27, 1929, https://www.icrc.org/ihl/INTRO/305?OpenDocument.

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155. The U.S. Senate, however, did not ratify/accede to the treaty until December 1974.

156. United States Strategic Bombing Survey, *Over-All Report, European War* (Washington, DC: Government Printing Office, 1945) and, United States Strategic Bombing Survey, *Summary Report, Pacific War* (Washington, DC: Government Printing Office, 1946). The United States Strategic Bombing Survey was established by the secretary of war on November 3, 1944, pursuant to a directive from the late President Roosevelt. For the summary report with an added table of contents for navigation, see http://www.anesi.com/ussbs02.htm. For the Pacific War, http://www.anesi.com/ussbs01.htm. The original survey comprises 208 volumes and includes a study of the effects on Hiroshima and Nagasaki.

157. R. J. Rummel, "Was World War II American Urban Bombing Democide?" http://www.hawaii.edu/powerkills/COMM.10.5.03.HTM. For a summary critique that examines the issues and includes multiple links to sources, see World Future Fund, "The Bombing of Civilians in World War II," http://www.worldfuturefund.org/wffmaster/Reading/war.crimes/World.war.2/Bombing.htm#THE BOMBING OF JAPAN; see also Charles S. Maier, "Targeting the City: Debates and Silences about the Aerial Bombing of World War II," *International Review of the Red Cross* 87, no. 859 (2005): 429–444, https://www.icrc.org/eng/assets/files/other/irrc_859_maier.pdf.

158. Adam Roberts, "Land Warfare: From Hague to Nuremberg," in *Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard, George J. Andreopolous, and Mark R. Schulman (New Haven, CT: Yale University Press, 1994) 131.

159. Steven R. Ratner, "War Crimes, Categories of," *Crimes of War*, http://www.crimesofwar.org/a-z-guide/war-crimes-categories-of.

160. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) (PA-I); text at http://www.unhchr.ch/html/menu3/b/93.htm; and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Conflicts (June 8, 1977) (PA- II); text at http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument.

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CHAPTER 3

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4. See Thomas X. Hammes, *The Sling and the Stone: On War in the 21st Century* (Minneapolis, MN: Zenith Press, 2006); Wesley K. Clark, *Winning Modern Wars: Iraq, Terrorism, and the American Empire* (New York: Public Affairs Press, 2004); Martin van Creveld, *The Transformation of War* (New York: The Free Press, 1991).

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31. *Uniform Code of Military Justice,* UCMJ, 64 Stat. 109, 10 USC §§ 801–946, text at http://www.au.af.mil/au/awc/awcgate/ucmj.htm.

32. Major William J. Johnson and Major Andrew D. Gillman, eds., *Law of Armed Conflict Deskbook* (Charlottesville, VA: International and Operational Law Department The United States Army Judge Advocate General's Legal Center and School, 2012), 9.

33. Michael N. Schmitt, "Air Warfare" in *Oxford Handbook*, ed. Clapham and Gaeta, 119.

34. Solis, *The Law of Armed Conflict*, 134.

35. Note that if the EU accepts Turkey's application for membership, ratification of the Additional Protocols would be a requirement for entry.

36. *Uniform Code of Military Justice*, UCMJ, 64 Stat. 109, 10 USC §§ 801–946, text at http://www.au.af.mil/au/awc/awcgate/ucmj.htm.

37. *The Heritage Guide to the Constitution*, "A Note on Article III Courts," http://www.heritage.org/constitution/#!/articles/3/essays/106/a-note-on-non-article-iii-courts.

The Supreme Court is the only (Article III) court established in the Constitution. Article III courts exercise the judicial power of the United States as defined by the provisions in the article. All other Article III courts apart from the Supreme Court exist by express statute.

38. *Reid v. Covert*, 354 U.S. 1 (1957), 77 S. Ct. 1222; 1 L. Ed. 2d 1148; *Kinsella v. Krueger*, 351 U.S. 470 (1960), 76 S.Ct. 886, 100 L.Ed. 1342. Mrs. Covert had killed her husband while living on a U.S Air Force base in England.

39. Solis, *The Law of Armed Conflict*, 89; UCMJ §803.3(a)(d).

40. In June 2015, the Department of Defense issued a new *Law of War Manual*, superseding the manuals developed by each branch. Department of Defense, *Law of War Manual* (Washington, DC: The Pentagon, 2015), http://www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf. The same is true of Canada, Israel, and the UK.

41. Gary Solis, *Marines and Military Law in Vietnam: Trial by Fire* (Washington, DC: History and Museums Division HQ, US Marine Corps, 1989), 32–33 (emphasis added).

42. See also 10 USC § 802.

43. *Restatement (Third) of the Foreign Relations Law of the United States (1987)*, § 402 comment g. Comment g states that "the principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." See John G. McCarthy, "The Passive Personality Principle and Its Use in Combatting International Terrorism," *Fordham International Law Journal* 13, no. 3 (1989), 298–327.

44. ICRC, "Universal Jurisdiction over War Crimes" (2014), http://www.universal-jurisdiction-icrc-eng.pdf; see also ICRC, "Customary Law IHL—Rule 157. Jurisdiction over War Crimes," https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157.

45. Christopher Greenwood, "Scope of Application of Humanitarian Law," in *Handbook of International Humanitarian Law*, ed. Fleck, 39–64

46. William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge, UK: Cambridge University Press, 2006), 242, 246.

47. Ibid., 233–234.

48. *Prosecutor v. Tadić*, ICTY Appeals Chamber (Interlocutory Appeal), Judgment of October 2, 1995, paras. 126–129.

49. Ibid., para. 70.

50. International Criminal Court, Elements of Crimes, Article 8.2(a), http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/elements%20of%20crimes.aspx.

51. Schabas, *The UN International Criminal Tribunals,* 236–239; Robert Cryer. Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge, UK: Cambridge University Press, 2014), 238–241.

52. George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," *American Journal of International Law* 37, no. 3 (1943): 407, 414–415.

53. *Actus reus* is the action or conduct that is a constituent element of a crime, as opposed to the mental state, *mens rea* (literally "guilty mind"), of the accused.

54. *Prosecutor v. Tadić*, ICTY Appeals Chamber (Interlocutory Appeal), Judgment of October 2, 1995, paras. 166, 168.

55. Antonio Cassese, *International Criminal Law* (Oxford, UK: Oxford University Press, 2003), 55–57.

56. Article 8.2(b).

57. Solis, *Law of Armed Conflict*, 250.

58. Immortalized in Alfred, Lord Tennyson's poem, "The Charge of the Light Brigade," https://www.poetryfoundation.org/poems-and-poets/poems/detail/45319.

59. "Bull Run: First Manassas," Civil War Trust, http://www.civilwar.org/battlefields/bullrun.html?tab=facts.

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61. Major Geoffrey Corn, "International and Operational Law Notes, Principle 2: Distinction," *The Army Lawyer* 8 (August 1998): 37.

62. Mark Bowden, *Black Hawk Down: A Story of Modern War* (New York: Atlantic Monthly Press, 1999), 293.

63. The 1923 *Hague Rules for Air Warfare* never entered into effect. See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, UK: Cambridge University Press, 2004), 82.

64. Dinstein, *Conduct of Hostilities*, 84.

65. Article 14, U.S. War Department, General Order No. 100, April 24, 1863, http://avalon.law.yale.edu/19th_century/lieber.asp.

66. Dinstein, *Conduct of Hostilities*, 16.

67. 1868 *St. Petersburg Declaration*, quoted in Dinstein, *Conduct of Hostilities*, 17.

68. *Prosecutor v. Stanislav Galić*, ICTY, Judgement of December 5, 2003 [IT-98–29-T], Section 44, fn 76.

69. Ibid., 264.

70. Second Lateran Council–1139 AD, Papal Encyclicals Online, http://www.papalencyclicals.net/Councils/ecum10.htm.

71. For the importance and role of crossbowmen, see Philippe Contamine, *War in the Middle Ages* (Oxford, UK: Blackwell Publishers, 1986), 132–135.

72. *Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles*. Saint Petersburg, November 29/December 11, 1868, https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C.

73. French text, J. B. Scott, *The Hague Peace Conferences of 1899 and 1907* (Documents) (Baltimore, MD: The Johns Hopkins University Press, 1909), 126.

74. Advisory Opinion, *Legality*, 257, para. 78.

75. Ibid.

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77. Article 41(c) of PA-I (1977) defines the term *hors de combat* as being: "Rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself."

78. Michael L. Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (Cambridge, UK: Cambridge University Press, 2010), 67.

79. "The Meaning of the Terms 'Injury' and 'Suffering' and the Test of Legality," *Weapons Law Encyclopedia,* http://www.weaponslaw.org/glossary/superfluous-injury-or-unnecessary-suffering.

80. The questions here relate to the nature of the wounds. Do these weapons fire a bullet that has the same effect as the outlawed dumdum? See *The Trauma Manual: Trauma and Acute Care Surgery*, 4th ed., ed. Andrew B. Peitzman, Timothy C. Fabian, Michael Rhodes, Donald M. Yealy, C. William Schwab (Philadelphia, PA: Lippincott Williams & Wilkins, 2013), 247–248. See also Robin Geiß, "Poison Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala," in *Yearbook of International Humanitarian Law, 2010*, ed. M. N. Schmitt, Louise Arimatsu, and Tim McCormack (Cambridge, UK: Cambridge University Press, 2011), 343–345.

81. See Solis, *Law of Armed Conflict*, 271, for a discussion of the U.S. Army review of the combat shotgun for compliance with international law. For an opposing view, see Fleck, *Handbook of Humanitarian Law*, 122 §407 that states that the dumdum bullet rule applies to shotguns "since shot causes similar suffering unjustified from the military point of view." See also ICRC, "A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement

Article 36 of Additional Protocol I of 1977," *International Review of the Red Cross* 88, no. 864 (2006): 931–956.

82. 18 U.S. Code § 2332a–Use of weapons of mass destruction:
    (2) the term "weapon of mass destruction" means—
        (A) any destructive device as defined in section 921 of this title;
        (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;
        (C) any weapon involving a biological agent, toxin, or vector (as those terms are defined in section 178 of this title); or
        (D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

83. Gross, *Modern Dilemmas*, 71

84. ICRC, 1980 Convention on Certain Conventional Weapons, Advisory Service on International Humanitarian Law, https://www.icrc.org/en/document/1980-convention-certain-conventional-weapons (download pdf document).

85. *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III), Geneva, October 10, 1980, https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=14FEADAF9AF35FA9C12563CD0051EF1E.

86. *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other* Devices as amended on May 3, 1996 (Protocol II to the 1980 CCW Convention as amended on May 3, 1996)

87. Sandoz, "Land Warfare," 98. Also see Articles 23 and 24 of Hague IV (1907).

88. Xenophon, *The Persian Expedition*, trans. Rex Warner (London: Penguin, 1972), 123–128.

89. Providing the emblems are removed, an enemy can use captured weapons such as tanks or aircraft. Escaping POWs may wear enemy uniforms to conceal their true identity provided they do not engage in hostilities while doing so.

90. Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge, UK: Cambridge University Press, 2005), 74.

91. Article 51.7 of PA-I (1977); Article 23 of Geneva Convention III (1949), POWs as hostage shields; Article 19 of Geneva Convention I (1949), medical units. See also Article 8(2)(b)(xxiii) of the Rome Statute of the ICC.

92. Sandoz, "Land Warfare," 97.

93. Dinstein, *Conduct of Hostilities*, 131.

94. Michael N. Schmitt, "Human Shields in International Humanitarian Law," *Columbia Journal of Transnational Law* 47 (2008–2009): 323–324; Amnon Rubinstein and Yaniv Roznai, "Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality," *Stanford Law and Policy Review* 22 (2011): 93–127.

95. ICRC, Commentary on Geneva Convention IV–Art. 33. Part III: Status and treatment of protected persons #Section I: Provisions common to the territories of the parties to the conflict and to occupied territories, https://www.icrc.org/ihl/com/380–600038.

96. James Larry Taulbee and John Anderson, "Reprisal *Redux*," *Case Western Reserve Journal of International Law*, 16, no. 3 (1984): 309–337. See also ICRC, "Reprisals," https://www.icrc.org/casebook/doc/glossary/reprisals-glossary.htm.

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100. Dinstein, *Conduct of Hostilities*, 218.

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CHAPTER 4

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2. Michael Walzer, *Arguing about War* (New Haven, CT: Yale University Press, 2004), ix–x.

3. The term "unprivileged belligerency" comes from an influential 1951 commentary written by Richard R. Baxter, "So-called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs," *British Yearbook of International Law* 28 (1951): 323–345.

4. Jean Pictet, ed., *Commentary, IV Geneva Convention* (Geneva: ICRC, 1958), 51.

5. See Geneva Convention (GC IV) relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949.

6. William Shakespeare, *Henry V* Act III. iii, http://www.william-shakespeare.info/script-text-henry-v.htm.

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10. The Rome Statute provides that there is no criminal responsibility when the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. Rome Statute, art 31.1(c). See also *Prosecutor v Kordić*, [IT-95–14/2-T, 449–51] (ICTY 2001). §§44–51.

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12. Rod Powers, "Joining the Military as a Non-U.S. Citizen," About.com, http://usmilitary.about.com/od/joiningthemilitary/a/noncitizenjoin.htm.

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118. Ibid.

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120. Latham, *Cold Days in Hell*, 215.

121. Prugh, "Prisoners at War," 131.

122. Ibid., 214; see also, 181–184.

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126. Donald W. Boose Jr., "The Korean War Truce Talks: A Study in Conflict Termination," *Parameters* 30, no. 1 (Spring 2000): 108.

127. Boose, "Korean War Truce Talks," 110.

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130. Carlson, *Remembered Prisoners*, 214.

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132. Note, "Misconduct in the Prison Camp," 721, n. 84. Although Britain has had an Army Act section condemning prisoner misconduct since 1881, no prosecutions occurred until 1946. Following World War II, 57 servicemen owing allegiance to the Crown were investigated for aiding the enemy while held captive. Thirty-six were classified as having served in the enemy armed forces, as having made broadcasts for the enemy, and six for having been associated with the British Free Corps, a group of insurgent prisoners organized to fight for the Germans, or some similar military unit. Many of those accused were found to have been members of pro-Nazi groups in civilian life. Ibid.

133. Note, "Misconduct in the Prison Camp," 719.

134. 2 U.S. (2 Dall.) 86 (Pa. Sup. Ct. 1781).

135. Note, "Misconduct in the Prison Camp," 723.

136. War Department, General Order No. 207 (1863); Quoted in Note, "Misconduct in the Prion Camp," n. 93.

137. Note, "Misconduct in the Prison Camp," 724.

138. Ibid., 721, n. 84 and sources therein. For a rather rambling treatment of British prosecutions for treason after World War II, see Rebecca West, *The Meaning of Treason* (New York: Viking, 1947).

139. Note, "Misconduct in Prison Camps," 724.

140. 10 U.S. Code § 904, 70A Stat. 70; Pub. L. 109–366, § 4(a)(2), Oct. 17, 2006, 120 Stat. 2631.

141. Ibid. Note also article 134, which is a catch-all.

142. Note, "Misconduct in Prison Camps," 754.

143. Latham, *Cold Days in Hell*, 228

144. Ibid., 229.

145. Ibid.

146. Ibid. 230.

147. At the time, the army had divided the continental command into seven domestic zones: HQs were in Governor's Island, New York; Fort Meade, Maryland; Fort McPherson, Georgia; Fort Sam Houston, Texas; Chicago, Illinois; Presidio, San Francisco, California; and the Military District of Washington, D.C.

148. See *United States ex rel. Toth v. Quarles*, U.S. Supreme Court 350 U.S. 11 (1955). After serving with the United States Air Force in Korea, Robert W. Toth was honorably discharged. He returned to his home in Pittsburgh and went to work in a steel plant. Five months later, he was arrested by military authorities on charges of murder and conspiracy to commit murder while an airman in Korea. At the time of arrest, he had no relationship of any kind with the military. Court held that an ex-serviceman cannot be constitutionally subject to court-martial for crime alleged during his military service.

149. Latham, *Cold Days in Hell*, 235–236.

150. Ibid., 260.

151. M. Lacey, "Aftereffects: Human Rights; Iraqi Detainees Claim Abuse by British and U.S. Troops," *New York Times* (May 17, 2003): 11. Three of the four detainees accepted nonjudicial punishment in lieu of a court-martial. Punishment included an administrative discharge and forfeiture of two months' pay. Two detainees accepted a reduction in rank. Charges were dropped against the fourth.

152. D. S. Cloud, "Private Gets 3 Years for Iraq Prison Abuse," *New York Times* (September 28, 2005): 20.

153. Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007), xii.

154. Ibid., 17.

155. The following is based upon ICRC, GC III, Commentary–Art. 85. Part III: Captivity #Section VI: Relations between prisoners of war and the authorities, Chapter III: Penal and disciplinary sanctions #I. General provisions, https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CD83E96981E1EE0C12563CD00427EE4.

156. *In Re Yamashita* 327 U.S. 1 (1946). For the views of Yamashita's defense team and accounts of the trials, see George F. Guy, "The Defense of Yamashita," *Wyoming Law Journal* 4, no. 3 (1950): 153–180; Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Wilmington, DE: Scholarly Resources, 1982); A. Frank Reel, *The Case of General Yamashita* (Chicago, IL: University of Chicago Press, 1949).

157. Horst Fischer, "Protection of Prisoners of War," in *The Oxford Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck (Oxford, UK: Oxford University Press, 1995), 336§705.

158. Executive Order 10631 (August 17, 1955)—Code of Conduct for members of the Armed Forces of the United States, 20 FR 6057, 3 CFR, 1954–1958 Comp., 266, unless otherwise noted; Department of Defense, *The Fighting Man's Code* (Washington, DC, 1955), http://www.loc.gov/rr/frd/Military_Law/pdf/US-fighting-code-1955.pdf.

159. Lucien Bodard, *The Quicksand War: Prelude to Vietnam* (Boston: Little Brown, 1967), 310.

160. Rochester and Kiley, *Honor Bound*, 480.

161. Promoted in absentia to specialist on June 19, 2010, and to sergeant on June 17, 2011.

162. See William Bradford Huie, *The Execution of Private Slovik* (Yardley, PA: Westholme Publishing, 2004).

163. Dan Lamothe, “Disillusioned and Self-deluded, Bowe Bergdahl Vanished into a Brutal Captivity,” *The Washington Post* (September 20, 2015), https://www.washingtonpost.com/world/national-security/disillusioned-and-self-deluded-bowe-bergdahl-vanished-into-a-brutal-captivity/2015/09/20/b15a8a8c-5f9b-11e5-b38e-06883aacba64_story.html.

164. There are three types of courts-martial: summary, special, and general:

Summary court-martial: Trial by summary court-martial provides a simplified procedure for the resolution of charges involving minor incidents of misconduct.

Special court-martial: A special court-martial is the intermediate court level. Regardless of the offenses involved, a special court-martial sentence is limited to no more than 12 months confinement (or a lesser amount if the offenses have a lower maximum), forfeiture of two-thirds basic pay per month for six months, a bad-conduct discharge (for enlisted personnel), and certain lesser punishments. An officer accused in a special court-martial cannot be dismissed from the service or confined.

General court-martial: A general court-martial is the most serious level of military courts.

Types of Military Court-Martial, *U.S. Military Lawyer*, http://www.usmilitarylawyer.com/types-of-court-martial.asp.

165. Richard A. Oppel Jr., “Bowe Bergdahl to Face Court-Martial on Desertion Charges,” *New York Times* (December 14, 2015), http://www.nytimes.com/2015/12/15/us/bowe-bergdahl-to-face-court-martial-on-desertion-charges.html?_r=0; Luis Martinez, “Bowe Bergdahl to Face General Court Martial, Could Face Life Sentence,” *ABC News* (December 14, 2015), https://gma.yahoo.com/bowe-bergdahl-face-general-court-martial-200031635.html#.

166. For an account by one of the escapees, see Oliver Philpot, *Stolen Journey* (London: Hodder and Stoughton, 1950).

167. The escape with Atterbury was actually Dramesi’s second attempt. Dramesi was highly critical of his fellow POWs, including Senator John McCain. See John A. Dramesi, *Code of Honor* (New York: Norton, 1975).

168. Rochester and Kiley, *Honor Bound*, 481.

CHAPTER 5

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3. Alison Weir, *The Wars of the Roses* (New York: Ballantine Books, 1996) gives a readable account in addition to sorting out the critical events of the years prior that fueled the conflict.

4. Barbara Tuchman, *A Distant Mirror: The Calamitous 14th Century* (New York: Knopf, 1978).

5. Monty G. Marshall, "Major Episodes of Political Violence 1946–2014," Center for Systemic Peace, http://www.systemicpeace.org/warlist/warlist.htm; see also Monty G. Marshall and Benjamin R. Cole, *Global Report 2014: Conflict, Governance and State Fragility* (Vienna, VA: Center for Systemic Peace, 2014); see also Council on Foreign Relations, *Global Conflict Tracker: Interactive Guide to the World's Conflict Zones*, http://www.cfr.org/global/global-conflict-tracker/p32137#!/.

6. Laurie R. Blank and Geoffrey S. Corn, "Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition," *Vanderbilt Journal of Transnational Law* 46, no. 3 (2013): 695. See also Benjamin Zawacki, "Politically Inconvenient, Legally Correct: A Non-international Armed Conflict in Southern Thailand," *Journal of Conflict and Security Law* 18, no. 1 (2013): 151–179.

7. Internal Displacement Monitoring Centre, *Global Overview 2015: People Internally Displaced by Conflict and Violence* (May 2015), http://www.internal-displacement.org/publications/2015/global-overview-2015-people-internally-displaced-by-conflict-and-violence.

8. The acronyms NIAC and LONIAC are taken from Yoam Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge, UK: Cambridge University Press, 2015).

9. GA Res. 2446, XXIII (1968); GA Res. 2621, XXV (1970); GA Res. 2678, XXV (1970); GA Res. 2871, XXVI (1971).

10. Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols," *Recuil de Cours* 163 (1979): 126–127.

11. Blank and Corn, "Losing the Forest for the Trees," 696.

12. Zawacki, "Politically Inconvenient, Legally Correct," 151–179.

13. D. R. Gordon and M. R. Munro, "The External Dimensions of Civil Insurrection," *Journal of Inter-American Studies and World Affairs* 25, no. 1 (1983): 59–81.

14. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford, UK: Oxford University Press, 2012), 9–20. James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford, UK: Oxford University Press, 2006), 380–383; see also James Larry Taulbee and Gerhard von Glahn, *Law Among Nations*, 10th ed. (New York: Pearson, 2012), 163–164. Note that Crawford does not include a discussion of insurgency.

15. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,* G.A. Res. 2625, 25 UN GAOR Supp. (No. 28) at 123, UN Doc. No. A/8028 (1970).

16. G.A. Res. 3314, 39 UN GAOR Supp. (No. 31) at 144, UN Doc. A/9631 (1974).

17. See Fourth Conference of Heads of State or Government of Non-Aligned Countries: Declaration on the Struggle for National Liberation (Algiers, September 5–9, 1973), in Odette Jankowitsch and Karl Sauvant, eds., *The Third World without Superpowers: The Collected Documents of the Non-Aligned Countries*, vol. I (Dobbs Ferry: Oceana, 1978), 207; Resolution No. 1 on Apartheid and Racial Discrimination in South Africa, in ibid., at 238; Fifth Conference of Heads of State or Government of Non-Aligned Countries (Colombo, August 1976): Political Declaration, in ibid., 747, 755–767; Resolution No. 1: South Africa, in ibid., 837; Resolution No. 2: Support and Solidarity Fund for the Liberation of Southern Africa, in ibid., 842; Resolution No. 3: Namibia, in ibid., 843; Resolution No. 4: Non-Recognition of

South African Bantustans, in ibid., 846; Racial Discrimination and Apartheid on the African Continent, in ibid., 847.

18. Sivakumaran, *Law of Non-International Conflict*, 213.

19. Ibid., 31.

20. Ibid., 32.

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CHAPTER 6

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CHAPTER 9

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29. *The Belsen Trials* (Trial of Josef Kramer and 44 Others), Case No. 10, British Military Court, Luneburg, September 17–November 17, 1945. For a concise summary of the proceeding, see http://www.ess.uwe.ac.uk/WCC/belsen1.htm.

30. For the relevant primary documents here, see The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm.

31. In 1940, Stalin ordered the execution of somewhere between 21,000 and 25,000 Polish POWs. Although it did not have the most deaths, the most noted in the west was the Katyn Forest massacre. For a brief discussion, see http://www.cnn.com/SPECIALS/cold.war/episodes/01/spotlight/index.html.

32. Text in *American Journal of International Law* 39, 257 (1945 Supp.); Consult *International Conference on Military Trials, London, 1945* (Department of State Publication 3080), for the texts of all proposals at the meeting. The principles contained in the 1945 Agreement were recognized as binding in international law by UN General Assembly Resolution 95 (I) (Dec. 11, 1946).

33. Taylor, *The Anatomy of Nuremberg*, 61.

34. Ibid., 61–64.

35. Text of judgment and the sentences reprinted in *American Journal of International Law* 41, 172–332 (1947). See also Taylor, *The Anatomy of Nuremberg*; Georg Schwarzenberger, "The Judgment of Nuremberg," *Tulane Law Review* 21 (1947), 329; Quincy Wright, "The Law of the Nuremberg Trial," *American Journal of International Law* 41 (1947), 37.

36. I did it, but you did it also.

37. For a brief summary see Robertson, *Crimes against Humanity*, 246–249.

38. See Maximillian Koessler, "American War Crimes Trials in Europe," *Georgetown Law Journal* 39:1 (1950); 18–112; William B. Cowles, "Trials of War Criminals (Non-Nuremberg)," *American Journal of International Law* 42:2 (1948), 299–319.

39. You will see this referred to as "equality of arms."

40. Arthur Lehman Goodhart, "The Legality of the Nuremberg Trials," *Juridical Review* (1946) reprinted in Guénaël Mettraux, ed., *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008), #29.

41. Cryer et al., *International Criminal Law and Procedure*, 95–96; Robertson, *Crimes against Humanity*, 248.

42. Robertson, *Crimes against Humanity*, 252.

43. The best analysis of the Tokyo trials in English is still Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971).

44. Text of charter at www.icwc.de/fileadmin/media/IMTFEC.pdf.

45. For a critical treatment, see Minear, *Victor's Justice: The Tokyo War Crimes Trial* (1971). For an interesting dissent attacking the basis for the charges against the defendants, see the opinion of Judge R. M. Pal (India) in *The United States of America, et al. Against Sadeo Araki, et al.* reprinted in Watkins and Weber, *War Crimes*, 337–343. Judge Pal argues, "The acts alleged are, in my opinion, all acts of state and whatever these accused are alleged to have done, they did that in working the machinery of the government, the duty and responsibility of working the same having fallen on them in due course of events." Pal, 338.

46. Watkins and Weber, *War Crimes and War Crime Trials*, 287.

47. General Homma had commanded the forces that had forced General Douglas MacArthur from the Philippines in 1942. See Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Wilmington, DE: Scholarly Resources, 1982), 26; see also A. Frank Reel, *The Case of General Yamashita* (Chicago, IL: University of Chicago Press, 1949). Reel served as part of General Yamashita's defense team.

48. *In Re Yamashita* 327 U.S. 1 (1946).

49. George F. Guy, "The Defense of Yamashita," *Wyoming Law Journal* 4 (1950): 156; Guy served as part of General Yamashita's defense team.

50. See Timothy Brooks, ed., *Documents on the Rape of Nanking* (Ann Arbor: University of Michigan Press, 1999).

51. Franklin A. Hart, "Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised," *International Law Studies Series* 62 (US Naval War College, 1980): 4.

52. Lael, *Yamashita Precedent*, 83.

53. Note the references here are to the 1929 Geneva Convention (*Convention Between the United States of America and Other Powers, Relating to Prisoners of War; July 27, 1929*).

54. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago, IL: Quadrangle Books, 1970), 182; for a critique of Taylor, see Hart, "Yamashita, Nuremberg and Vietnam," 397–414.

55. Major Bruce D. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now," *Military Law Review* 149 (1995): 300.

56. *United States v. Wilhelm List*, United State Military Tribunal, Nuremberg, July 8, 1947–February 19, 1948; http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf, 88–90.

57. Landrum, "Yamashita," 298.

58. *United States v. Wilhelm von Leeb and Thirteen Others*, United States Military Tribunal, Nuremberg, December 30, 1947–October 28, 1948, http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf, 106–109.

59. Landrum, "Yamashita," 299.

60. For summaries of the important trials and defendants, see Watkins and Weber, *War Crimes*, 191–272.

61. For a comprehensive account, see Joshua M. Greene, *Justice at Dachau: The Trials of an American Prosecutor* (New York: Broadway Books, 2003).

62. Maximilian Koessler, "American War Crimes Trials in Europe," *Georgetown Legal Journal* 39, no. 1 (1950).

63. *U.S. vs. Valentin Bersin et al.* (July 1946).

64. Glenn B. Infield, *Skorzeny* (New York: St. Martin's Press, 1981), 78; Otto Skorzeny, *Skorzeny's Special Missions: The Memoirs of the Most Dangerous Man in Europe* (St. Paul, MN: Greenhill Books, 2006), 11.

65. Greene, *Justice at Dachau*, 321.

66. Ibid., 340.

67. M. Cherif Bassiouni, "Combating Impunity for International Crimes," *Colorado Law Review* 71, no. 2 (2000): 417–418.

68. Ibid., 417.

69. Michael Scharf noted: "From the beginning, the Security Council's motives in creating the tribunal were questionable. During the negotiations to establish the court . . . it became clear that several of the Security Council's permanent members considered the tribunal a potential impediment to a negotiated peace settlement." Michael Scharf, "Indicted for War Crimes. Then What?" *Washington Post* (October 3, 1999): B01. Note that both China and Russia had reason to be wary—China because of Tiananmen Square and Russia because of Chechnya.

70. United Nations: Secretary-General's Report on Aspects of Establishing an IT, 32 *ILM* 1163, 1192 (1993); International Tribunal, "Rules of Procedure and Evidence," 33 *ILM* 484 (1994); see also James C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *American Journal of International Law* 87, no. 4: (1993): 639–658.; Diane F. Orentlicher, "Yugoslavia War Crimes Tribunal," *American Society of International Law Newsletter* (June–August 1993), *ASIL Focus* No. 1.

71. Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law," *American Journal of International Law* 88, no. 1 (1994): 78–88. At this time, Meron, who would later serve as president of the court, wrote, "Despite its desirability, it is probable that the tribunal will not be very effective." Theodor Meron, "The Case for War Crimes Trials in Yugoslavia," *Foreign Affairs* 72, no. 3 (1993): 122.

72. Bass, *Stay the Hand of Vengeance*, 224. See also Gérard Prunier, *The Rwanda Crisis* (New York: Columbia University Press, 1997).

73. For a lengthy examination of the politics and time line involved in establishing the tribunals, see Schabas, *The UN International Criminal Tribunals*, 3–46; and Daphna Shraga and Ralph Zacklin, "The International Criminal Court for the Former Yugoslavia," *European Journal of International Law* 5, no. 1 (1994): 1–22.

74. UN SCOR, S/RES/953 (1994), Preamble, para. 3. See also, Daphna Shraga and Ralph Zacklin, "The International Criminal Court for Rwanda," *European Journal of International Law* 7, no. 4 (1996): 501–518.

75. UN SCOR S/RES/1503 (August 28, 2003); UN SCOR S/RES/1504 (September 4, 2003). See also *Completion Strategy of the International Criminal Tribunal for Rwanda*, May 2005, (S/2005/336), which contains estimates relating to the workload.

76. Tim Hume, Tiffany Ap, and Milena Veselinovic, "Radovan Karadzic Found Guilty of Genocide, Sentenced to 40 Years," CNN (March 24, 2016), http://www.cnn.com/2016/03/24/europe/karadzic-war-crimes-verdict/. Marija Tausan, "Verdict against Mladic in March 2017." Justice Report (December 10, 2014), http://www.justice-report.com/en/articles/verdict-against-mladic-in-march-2017.

77. See United Nations Mechanism for International Criminal Tribunals, http://www.unmict.org/.

78. Erik Mose, president of the ICTR (2003–2007) noted in an address to the UN General Assembly (November 15, 2004), "It is a paradox that indispensable financial contributions are not paid when the Tribunal is doing its utmost to complete its task. We cannot maintain the speed if the brakes are on. A slowing down of the judicial process may also mean that Member States have to pay their contributions for longer periods of time. As stated in our Annual Report, the Tribunal strongly recommends that it continues to receive sufficient resources to enable it to comply with the deadlines set by the Security Council," http://69.94.11.53/ENGLISH/speeches/mose151104.htm.

79. A judge who only participates in a particular case or a limited set of cases (same as a judge ad hoc). *Ad litem* literally means "for the legal action." Judges *ad litem* were not part of the original structure but added later (2001) because of heavy caseloads and the length of trials.

80. On April 7, 2006, the Appeals Chamber upheld the decision to refer the *Mejakić et al.* case, involving four accused, to Bosnia and Herzegovina for trial. The Appeals Chamber dismissed eight of the grounds in the Joint Defense Appeal and allowed one in part, http://www.un.org/icty/latest–e/index.htm.

81. ICTY at a Glance.

82. Article 4 of the statute states: "The Court shall have international legal personality."

83. Text at http://www.icc–cpi.int/library/asp/ICC–ASP–3–Res1_English.pdf.

84. http://www.icc–cpi.int/organs/chambers.html.

85. Coalition for the International Criminal Court, "Delivering on the Promise of a Fair, Effective and Independent Court: The Crime of Aggression," http://www.iccnow.org/?mod=aggression.

86. For a list of current cases, see http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx.

87. In December 2000, the United Nations General Assembly unanimously adopted a resolution on the role of diamonds used to fund conflicts, particularly in Africa. UN GAOR A/RES/55/56 (December 1, 2000). The General Assembly recognized that "conflict" (blood) diamonds formed a crucial element in the ongoing wars in parts of Africa.

88. UN SCOR S/RES/1315 (January 16, 2002).

89. *Prosecutor v. Charles Ghankay Taylor*, Appeal Judgement of September 26, 2013[SCSL-03–01-A-1389].

90. See Kelly-Kate Pease, "The Joint Criminal Enterprise Debate and the Case of Charles Taylor: The Politics of International Criminal Tribunal Law," in *Trials and Tribulations of International Prosecution*, ed. Henry R. Carey and Stacy M. Mitchell (Lanham, MD: Lexington, 2013), 17–33.

91. For a concise history, see James L Taulbee, "A Call to Arms Declined: The United States and the International Criminal Court," *Emory International Law Review* 14 (Spring 2000): 105–156.

92. G.A. Res. 177(II), UN Doc. A/519 (1947).

93. See International Criminal Court, "Situations and Cases," http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situa28tions%20and%20cases.aspx.

94. "Nice Idea, Now Make It Work," *The Economist* (December 6, 2014), http://www.economist.com/news/international/21635470-international-criminal-court-struggling-justify-itself-amid-accusations-bias.

95. Ibid.

96. See Faiza Patel King and Anne-Marie LaRosa, "The Jurisprudence of the Yugoslavia Tribunal: 1994–1996," *European Journal of International Law* 8, no. 1 (1997): 123–180.

97. See Payam Akhavan, "Justice, Power and the Realities of Interdependence: Lessons from the Milošević and Hussein Trials," *Cornell Journal of International Law* 38 (2005): 973–982. For another assessment, see Julie Kim, *Balkan Cooperation on War Crimes Issues: 2005 Update*, Congressional Research Service #RS22097 (March 28, 2005).

98. See International Criminal Court, http://www.icty.org/action/cases/4.

99. For example, "The very idea of an international criminal court may well be a dangerously utopian one to begin with. As various critics of the ICC have pointed out, courts derive whatever democratic legitimacy they may enjoy from being embedded in more comprehensive systems of government in which their powers are checked by democratically accountable institutions." John Rosenthal, "A Lawless Global Court: How the International Criminal Court Undermines the UN System," *Policy Review* 123 (Feb/March 2004), http://www.hoover.org/publications/policyreview/3439981.html.

100. See for example, Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), and William A. Schabas and Shane Darcy, eds., *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (Dordrecht, NL: Kluwer, 2004), for a good discussion of the issues here.

101. For a comprehensive critique by a participant, see Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge, UK: Cambridge University Press, 2007).

102. "Sudan promised to turn Darfur into a graveyard yesterday as it reacted with fury to charges laid by an international prosecutor accusing President al-Bashir of genocide, crimes against humanity and war crimes. The threat was made by an official in Darfur after Luis Moreno-Ocampo, the chief prosecutor of the International Criminal Court (ICC), called for the arrest of Omar al-Bashir for his Government's ruthless campaign of violence in the war-torn region." "Sudanese President, Omar al-Bashir, Charged with Genocide," *London TIMESONLINE* (July 15, 2008), http://www.timesonline.co.uk/tol/news/world/africa/article4330605.ece.

103. See James L. Taulbee, "A Call to Arms Declined: The United States and the International Criminal Court," *Emory International Law Review* 14 (Spring 2000): 105–156.

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